Original

No. 319. 78

Brf. of Calhoon & Green for Appellees

Office Supreme Court U. S.
FILED
MAR 7 1900
JAMES H. McKENNEY, Clerk.

Filed Mar. 7, 1900.

Supreme Court of the United States

No. 319.

October Term, 1899.

The Illinois Central Railroad Company, *Appellant.*

vs.

Wirt Adams, State Revenue Agent, and the Railroad Commission of the State of Mississippi, Et Al., *Appellees.*

Brief in Support of Motion to Dismiss or Affirm.

S. S. CALHOON,
MARCELLUS GREEN,
Of Counsel for Appellees.

17,433

10115

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MOTION TO DISMISS OR AFFIRM.

Come all the appellees, except Yazoo & Mississippi Valley Railroad Company, and move the court to dismiss this appeal.

First. Because it is an appeal from a decree refusing to grant an injunction and the purpose and object of the injunction has failed;

Second. Because this court has no jurisdiction of this appeal;

Or, to affirm the decree it being manifest, even if this court has jurisdiction, that said appeal was taken for delay only, and the questions upon which the jurisdiction depends are frivolous.

~~R. C. BECKETT~~, R. C. Beckett
~~S. S. CALHOON~~, S. S. Calhoon
~~F. A. CRITZ~~, F. A. Critz
~~MARCELLUS GREEN~~, Marcellus Green

Attorneys for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY,

No. 319. vs. APPELLANT,

WIRT ADAMS, *State Revenue Agent;* THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

NOTICE.

To MR. EDWARD MAYES,

Attorney of Record for Appellant in the above styled cause.

You are notified hereby that the appellees, except said Yazoo & Mississippi Valley Railroad Company, in the above-named cause will, on Monday, the 26th day of March A. D. 1900, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motion to dismiss or affirm, and the brief of the argument thereon hereto attached.

R. C. Beckett ~~R. C. BECKETT~~,

F. A. Critz ~~F. A. CRITZ~~,

S. S. Calhoon ~~S. S. CALHOON~~,

Marcellus Green ~~MARCELLUS GREEN~~,

Attorneys for said Appellees.

10116

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY,

No. 319. vs. APPELLANT,

WIRT ADAMS, *State Revenue Agent;* THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, *et al., Appellees.*

Appeal from the circuit court of the United States for the southern district of Mississippi.

AFFIDAVIT OF SERVICE.

Before me, L. B. Mosely, clerk of the circuit court of the United States, for said southern district of Mississippi, at my office at Jackson, in said district, this day personally appeared the above named Wirt Adams, one of said appellees, well known to me as such, and, being by me duly sworn, deposes and on oath says that on this day he duly delivered in person to Mr. Edward Mayes, one of the attorneys of record for the above-named appellant, in person, a true copy of the attached motion, notice and brief of the argument, together with a copy of his affidavit, setting up the decree of the State Court as *res adjudicata.*

Wirt Adams

Sworn to and subscribed before me, this 2 day of March, 1900. L. B. Mosely *Clerk.*

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1899.

No. 319.

THE ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant,*

vs.

WIRT ADAMS, *State Revenue Agent;* THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI, *et al., Appellees.*

Appeal from the circuit court of the United States for the southern district of Mississippi.

ON MOTION TO DISMISS OR AFFIRM.

Brief of S. S. Calhoon and Marcellus Green, attorneys for all of appellees, except Yazoo & Mississippi Railroad Co., on said motion.

STATEMENT OF CASE.

Appellant, the Illinois Central Railroad Company, a corporation and a citizen of the State of Illinois, filed its original bill in the circuit court of the United States for said district on August 4, 1898, against Wirt Adams, State Revenue Agent of the State of Mississippi; the Railroad Commission of the State of Mississippi, T. C. Kimbrough, clerk of said commission, and the Yazoo & Mississippi Valley Railroad Company,

a Mississippi corporation, domiciled in Mississippi, to enjoin said Railroad Commission, as State Railroad Assessors, from approving the assessment for taxation—State, county and municipal—made and ordered by the said commission on August 2nd, 1898, on the railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co., for the years 1886 to 1891, inclusive; and to enjoin said Kimbrough, as such clerk, from certifying said assessment; and to enjoin said Wirt Adams, State Revenue Agent, from bringing any suit for the recovery of a judgment or decree against Yazoo & Miss. Valley R. R. Co., or for the enforcement of the lien for said taxes, or from taking any steps towards the subjection of said property to said taxes.

A fiat for an injunction was granted, *ex parte,* by the district judge, and an injunction was issued, and which by common consent was treated as a restraining order. A motion for injunction was made by appellant upon the bill, and a counter motion to discharge the restraining order was made by all of the appellees, except Yazoo & Miss. Valley R. R. Co.

These motions were heard in January, 1899, and upon the bill and evidence, the circuit court discharged the restraining order and refused to grant an injunction. From this interlocutory decree an appeal was taken to the United States circuit court of appeals, and that court, *of its own motion,* after hearing the merits, dismissed the appeal. Thereupon,

solely because the injunction had been refused, on motion of all appellees, save Yazoo & Miss. Valley R. R. Co., the bill was dismissed. Thereupon, under the first paragraph of Sec. 5, of the judiciary act of 1891, an appeal was taken to this court, upon certificate of the question of jurisdiction. Appelles, save Yazoo & Miss. Valley R. R. Co., move to dismiss or affirm.

The bill predicated the right of appellant, on its own behalf, to invoke the jurisdiction of the court to enjoin the approval of the asssessment in process of being made by the State Railroad Commission, and the bringing of a suit upon such assessment, when approved, by the State Revenue Agent, to recover the taxes so assessed, against Yazoo & Miss. Valley R. R. Co., and the railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co. upon these grounds.

1. That appellant was *a stockholder* of the Miss. Valley Company, a Mississippi corporation, and that the *Miss. Valley Company* was a *stockholder* in Louisville, New Orleans & Texas Ry. Co., with which the Yazoo & Miss. Valley R. R. Co., both Mississippi corporations, formed, by consolidation in 1892, the Yazoo & Miss. Valley R. R. Co., one of the defendants to the bill; that in 1890, said Louisville, New Orleans & Texas Ry. Co. had acquired by purchase, the property and franchises, privileges and immunities of the Natchez, Jackson & Colum-

bus R. R. Co. sought to be taxed by said asssessment and said suit. Par. xii., R. 17.; Par. ix., R. 12,13; Par. xiv. R. 19.

2. That appellant, in 1892, as mortgagee, became a *bona fide* purchaser for value and without notice of said property so sought to be assessed. Par. xiii., R. 9.

The gravamen of the bill was:

1. That since the organization of the State there had been a settled public policy to confer upon corporations chartered for public improvements exemption from taxation. That Art. xii., Sec. 13, of the Constitution of 1869, provides: "The property of all corporations, for pecuniary profits, shall be subject to taxation, the same as that of individuals;" and, "Section 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law." That in 1870, the legislature enacted the 21st section of the charter of Mobile & Northwestern R. R. Co., which is set forth in the record, page 5, and that this 21st section was extended to Natchez, Jackson & Columbus R. R. Co. by the amendment to its charter of August 8th, 1870. That in 1872 there was an act passed entitled "An act to encourage the introduction of machinery and the establishment of factories in the State of Mississippi." (Said act is similar to said 21st section, except that it is a general act applicable to all of the class of factories, individual and corporate, and contains no irrepealable clause, and there

are other differences apparent upon inspection); the said act of 1872 is found in the record on page 7. This act of 1872, as amended in 1873, was amended in 1877 "so as not to exempt from taxation * * * any property of any manufactory" other than the capital stock, factory proper and manufactured goods. That Mississippi Mills, a manufacturing corporation, after the passage of the said act of 1877, filed its bill claiming that said act of 1877 "and the things about to be done under it, impaired the obligation of its charter contract," and prayed injunction against the tax collector restraining the enforcement of said act of 1877; that the State Supreme Court in that case (Miss. Mills vs. Cook, 56 Miss., 40) declared the rule of interpretation of said constitution of 1869. "to-wit: That the words of said section 13, article xii of said constitution aforesaid, did not require any legislature to tax the property of corporations for pecuniary profits, and that the words shall be subject to did not mean subjected to; or, in other words, that said provision is mandatory, not that the property of the corporation shall be taxed (that is left to the legislature), but that such property shall ever be subject to, i. e. liable—to be taxed, if the legislature so will." R. 8. That this interpretation has been followed by the Supreme Court of the State in many cases since April, 1878, and has been for twenty years the settled law and rule of property of that State, and has been adopted and acted upon by the legislature, executive and judicial de-

partments of the State, and that upon this rule of property appellant acted in making its investments and contracts herein mentioned. That many kinds of property were exempted from taxation in each of the revised codes; and in the code of 1892, by Sec. 3744, "all permanent factories hereafter established in this State," etc., were exempt from taxation. That by the acts of 1884, Chap. 22, and acts of 1890, Chap. 2, all railroads in process of construction were exempted from taxation. That by the acts requiring railroad companies to file schedules of their property with the railroad commission, "who were authorized to asssess the same for taxation, where the law provided for it," it was provided "if any of said property is claimed to be exempt from taxation, it shall be separately stated and the law cited under which the exemption is made;" "and said commission was to assess for taxation such property owned as was liable for taxation under the existing laws;" and that the constitution of 1890, by Sec. 181, provided: "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions, as expressed in their respective charters, or by the general laws, unless sooner repealed by the legislature." Par. v., R. 9.

That Natchez, Jackson & Columbus R. R. Co. was chartered July 20, 1870, and the said 21st section of the charter of Mobile & Northwestern R. R. Co. was extended to it by act

of August 8, 1870, and that that company accepted the charter so amended. That complainant is not informed if any work was done prior to the said decision in Miss Mills vs. Cook, but that it was not until 1879 that the road was finished to Martin—forty-three miles—and not until September, 1881, that it was extended from Martin to Miles, fifteen miles, and not until October, 1882, that said road was constructed and put in operation to Jackson. That Natchez, Jackson & Columbus R. R. Co. issued its capital stock for $2,028,000, and its $1,250,000 mortgage bonds in such construction. That said Natchez, Jackson & Columbus R. R. Co. incurred said liabilities on the faith of said 21st section, and said Miss. Mills decision. Par. vii., R. 10, 11. That Natchez, Jackson & Columbus R. R. Co. was never enabled to pay any dividend to its stockholders. R. 12. That in 1882 an act was passed entitled: "An act to authorize the Memphis & Vicksburg R. R. Co. and the Mississippi Vallley and Ship Island R. R. Co. to effect a consolidation," and this act was amended by the act of 1884 entitled, "An act to amend an act entitled 'An act to authorize the Memphis & Vicksburg R .R. Co. and the Mississippi Valley & Ship Island Railroad Companies to effect a consolidation, approved March 3rd, 1882." That said 21st section was section 5 of said act of 1882. That under said acts of 1882 and 1884 the Louisville, New Orleans & Texas Ry. Co. was formed by the consolidation of the Memphis & Vicksburg R. R. Co. and New

Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., both Mississippi corporations, and a Tennessee and a Louisiana corporation, and the said railroad from Memphis to New Orleans "was speedily constructed by the aforesaid constituent companies and by the consolidated company, in the years 1882, 1883 and 1884," and was completed December 1, 1884.

Par. viii., R. 12.

That in 1890 an act was passed authorizing Natchez, Jackson & Columbus R. R. Co. to sell to or consolidate with Louisville, New Orleans & Texas Ry. Co., all of its property, rights, powers, privileges and immunities. That when this act was passed the case of Miss. Mills vs. Cook "had been expressly followed, or its principle applied without express citation," in the later cases of McCulloch vs. Stone, 64 Miss., 378, decided in 1886; Railroad Co. vs. Thomas, 65 Miss., 553; decided in 1888, and Bank vs. Worrell, 67 Miss., 47, decided in 1889. That in McCulloch vs. Stone, 64 Miss., *supra*, this 21st section in the charter of Louisville, New Orleans & Texas Ry. Co. was under consideration, and while deciding that this privilege did not attach to outlying lands, that case did declare that it did attach to such property as was 'necessary to the construction, equipment, maintenance and operation of its road.' That in 1890 Natchez, Jackson & Columbus R. R. Co. had been in the enjoyment for twelve years of this privilege, openly and notoriously, and in the passage of said act of 1890

the legislature was aware of the said decisions of the State Supreme Court upon the validity of said 21st section, and by said act of 1890 it was intended to pass, by sale, the benefits of said 21st section. That in reliance upon said decisions in Miss. Mills case and the other cases named, and upon the futile efforts in 1886 and 1898 to repeal this privilege with others of like character, Louisville, New Orleans & Texas Ry. Co. in good faith, for value and without notice, purchased said property, rights, powers, franchises and immunities of Natchez, Jackson & Columbus R. R. Co., and issued therefor $800.000 of its first mortgage 4 per cent bonds secured by first mortgage on its entire line, and that these bonds are outstanding in the hands of *bona fide* purchasers, Par, viii, R. 13, 14. The deed of purchase is made E. A. to the bill. R. 35. That said 21st section in the charter of Natchez, Jackson & Columbus R. R. Co., and the contracts whereby the same was vested in the Louisville, New Orleans & Texas Ry. Co. are valid contracts under the constitution and laws of the State of Mississippi, and as then expounded by the State Supreme Court, and could not be invalidated by any subsequent change of judicial decisions, nor could such subsequent decision "as to the constitutional power of the legislature to enact said act of incorpartion and grant said exemption, change or impair the rights of the parties under said charter contract, which was, as aforesaid, valid when made." That though said sev-

eral decisions denominate said 21st section an "exemption from taxation, the railroad companies have never accepted that view; but they deny that it is an exemption within said Sec. 13, Art. xii., Const. 1869. That said 21st section "is a contract of appropriation as aforesaid, whereby the legislature authorized a special and peculiar mode of paying taxes, and a special and peculiar method of granting aid to the construction of railroads, which is entirely other and different from an exemption, and is not and never was within the prohibition of section 13, Art. xii., aforesaid. The same is and was a contract within the meaning of the Constitution of the United States, which forbids any State to pass a law impairing the obligation of a contract." That the difference between the two views has hitherto been immaterial as the legislature has refused to repeal the privilege. That said 21st section is irrepealable either by the legislature or subsequent judicial decision. That if said 21st section is regarded as an exemption, and within the operation of the constitution of 1869, the courts could not by subsequent decision change that which the constitution left to the legislature, and that this is what is sought to be done by the proceedings herein sought to be enjoined.

Par. x., R. 15-16.

That the power of the legislature to grant an exemption under the constitution of 1869 was affirmed in 1890 in Railway Co. vs. Taylor, 68 Miss., 361, and Attala Co. vs. Kelly, 68

Miss., 40; and that in the said Taylor case the court gave the Louisville, New Orleans & Texas Ry. Co. the benefit of this identical section 21. That by the constitution of 1890 it was, by Sec. 181, declared: "The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals" 'there was then a special reservation of their existing rights to exemptions previously conferred. The section contains this language: Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution," etc., as recited *supra*. And by Sec. 279: "All rights, actions, causes of action, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation, shall continue," etc. That the constitution of 1890 intended to preserve the said immunity of said 21st section. That said Taylor case was decided in March, 1891, and thereby the court adjudged that said 21st section, as a part of the charter of the Louisville, New Orleans & Texas Ry. Co., was a benefit conferred upon said company to which it was legally entitled, and virtually a privilege continued by said constitution. That by implication this must also have thereby been adjudged as to the said 21st section in the charter of Natchez, Jackson & Columbus R. R. Co. transferred under the act of 1890 to said Louisville, New Orleans & Texas Ry. Co. Par. xi., R. 16-17.

That appellant purchased $13,805,000 of the first mort-

gage bonds; $8,731,000 of the second mortgage bonds and $8,347,000 of the income third mortgage bonds of Louisville, New Orleans & Texas Ry., Co., in April 1892, upon the faith of said legislation, judicial decisions and the said Act of 1890, and thereby appellant acquired a lien as security upon the property, rights, powers, franchises and immunities, acquired by Louisville, New Orleans & Texas Ry. Co., R. 17-18.; and that appellant paid for said stock of Louisville, New Orleans & Texas Ry., Co., purchased by Miss. Valley Co., in April, 1892, and for said first, second and third mortgage bonds of Louisville, New Orleans & Texas Ry., Co., by its $20,000,000 mortgage bonds; R. 19., and that relying on the legislation and adjudications aforesaid, and the said constitutional provisions, and the action of the Legislature in refusing to repeal said 21st section, appellant executed its mortgage to secure an issue of $25,000,000 of bonds, of which said $20,000,000 was part. That said $1,250,000 bonds of N. J. & C. R. R. Co., and all of said first, second and third mortgage bonds so purchased, were placed in the hands of United States Trust Co., of New York, as collateral security for said total issue of $25,000,000 of the bonds of appellant. R. 19.

That on Oct. 24, 1892, Louisville, New Orleans & Texas Ry. Co., and the Yazoo & Mississippi Valley R. R. Co., (a Mississippi corporation, chartered in 1882) "pursuant to the authorities conferred upon them by their respective charters,'

effected a consolidation whereby the existence of said Louisville, New Orleans & Texas Ry. Co., was merged into that of Yazoo & Mississippi Valley R. R. Co., and all of the property, real and personal, and all of the rights, franchises, privileges and immunities of Louisville, New Orleans & Texas Ry. Co., were transferred to, and became those of Yazoo & Mississippi Valley R. R. Co. That said consolidation was effected on the faith of the adjudications and legislative and constitutional enactments "hereinbefore stated;" that said 21st Section was a material part of the contract of consolidation and its enjoyment was had in view by Yazoo & Mississippi Valley R. R. Co. The Articles of Consolidation are made Ex. C. to the bill. R. 43.

That after said consolidation of Oct. 24, 1892, the State Supreme Court, in Railroad *vs* Lambert, 70, Miss. 779, again passed upon said 21st Section as a part of the charter of Natchez, Jackson & Columbus R. R. Co., as passed to Louisville, New Orleans & Texas Ry. Co., by purchase in 1890, and to Yazoo & Miss. Valley R. R. Co., by the consilidation of 1892, and reaffirmed the doctrine of Miss. Mills *vs.* Cook, and held that said 21st section was valid and effectual; that it inured to Louisville, New Orleans & Texas Ry. Co., by the purchase in 1890, and to the Yazoo & Miss. Valley R. R. Co., by the consolidation of 1892; that appellant relying upon said decision and said previous decisions "hereinbefore stated," and upon the

Legislative and Constitutional provisions "hereinbefore set forth," and the refusal of the Legislature to interfere with said 21st Section by repeal, issued more of said series of $25,000,000 of bonds in and about the extension and improvement of said Louisville, New Orleans & Texas Ry. property.

Par. XIV, R. 19-20.

That the State Revenue Agent proceeding under Chap. 126, Code 1892, as amended by the Act of 1894, inaugurated and conducted certain suits against appellant and Yazoo & Miss. Valley R. R. Co., for the taxes assessed against the property that had been the property of Louisville, New Orleans & Texas Ry. Co., for the years 1892-1895 inclusive, "but not including any taxes upon the property that had formerly been property of Natchez, Jackson & Columbus R. R. Co." R 21. Avers it is unnecessary to set forth the scope of that litigation, but avers that "it is sufficient to say that on the 20th of June, 1898, the Supreme Court of this State rendered in such cause a decision wherein they held, amongst other things, that the Constitution of 1869 meant that the property of corporations for pecuniary profit should actually be subjected to taxation, and it did, in express terms, overrule the Miss. Mills case aforesaid, and by necessary consequence overruled all subsequent cases holding the same doctrine, and did in express terms declare that the said Section 21, of the Mobile & Northwestern Railroad charter was unconstitutional and null and

void *ab initio.* That said decision overturns the former settled construction of the Constitution and Statutes of the State and the accepted rule in the departments of government, legislative, executive and judicial, and by the Constitution of 1890, on the faith of which the large pecuniary transactions hereinbefore set forth had been based. That such decision and action of the Supreme Court "when sought to be practically applied as it is now sought to be so applied by the defendents herein, as will be hereinafter shown, is subversive of the various contract rights and contract obligations hereinbefore set forth, and in which your orator is interested" and is in conflict with the Constitution of the United States, in that it impairs the obligation of said contracts, and deprives appellant of his property without due process of law and denies to appellant the equal protection of the laws

Par. xv. R. 20-1.

That relying on said "extraordinary and shocking" decision of June 20th, 1898, "the State Revenue Agent, proceeding under the claim of authority aforesaid, made application to the State Railroad Commission * * that they should proceed under the said law of 1894, and assess the property hereinbefore described, which had been the property of the Natchez, Jackson & Columbus Railroad Company, for back taxes for the years 1886, 1887, 1888, 1889, 1890 and 1891, and to assess such taxes against the Yazoo & Mississippi Railroad Company

as the owner at this time of said property, and against Natchez, Jackson and Columbus Railroad Company as the owner of the same during the years 1886 to 1890, inclusive. And proceeding under the request of the State Revenue Agent, as aforesaid, the said Railroad Commission did, on the first day of August, 1898, proceed to assess taxes against the said Yazoo & Mississippi Valley Railroad Company, as owner, and against the Natchez, Jackson & Columbus Railroad Company as owner, and against said property" at a certain rate per mile, specifying the rate, aggregating a total assessment of more than $50,000.

Par. xvi. R. 21-2.

That the said notice of the State Revenue Agent and the findings of the State Railroad Commission pursuant thereto, are made parts of the bill and Ex. D. thereto. Exhibit D. shows a notice by the State Revenue Agent to the State Railroad Commission, dated *Dec.* 31, 1897, informing the Commission that the railroad property formerly belonging to Natchez, Jackson & Columbus R. R. Co., had escaped taxation during the years 1886, 1887, 1888, 1889, 1890 and 1891 because not assessed, and calling on the said Commission to assess the property for taxation, and to give notice to Yazoo & Mississippi Valley R. R. Co., and Natchez, Jackson & Columbus R. R. Co., R. 49-50.

The bill further avers that complainant does not

know whether or not said property was assessed, but if not, it was the fault of the State's officers; that it was the duty of the assessing officers under the Code of 1880 to assess railroads for taxation, and the failure to do so was because of the recognition of the exemption from taxation. That as there was no assessment when Louisville, New Orleans & Texas Ry. Co., purchased the property, it, as a *bona fide* purchaser, took discharged of the power to retroactively assess. R. 22-3.

Avers that by the said consolidation of 1892, Yazoo & Mississippi Valley R. R. Co. became a *bona fide* purchaser of said property, for value and without notice, and that this right is superior to that for said, then, unassessed taxes. R. 23. That such retroactive assessment would be an attempt to overreach the said contract of consolidation and purchase, and would impair the obligation of said contracts, and would deprive appellant of its property without due process of law, and would deny to it the equal protection of the laws. R. 23-4.

That Natchez, Jackson & Columbus R. R. Co. for 1886, 1887, 1888 and 1889, and Louisville, New Orleans and Texas Ry. Co., for 1890 and 1891, paid in each year the taxes which were assesable conformably to said 21st Section, and were entitled to the receipts from said tax-collectors, and would have made such affidavits and received such receipts, had the same been assessed conformably to law." That Natchez, Jackson, & Columbus R. R. and Louisville, New Orleans & Texas Ry

10125

Co., is now extinct, and if the said assessment of August first 1898, is allowed to stand, there are no officers in existence to make the affidavits required, and this without fault of the railroad companies, but wholly by the fault of the State Railroad assessors. That said 21st Section contemplated annual settlements and did not contemplate settlements ten or fifteen years after the year involved by retroactive assessment. R. 24-5.

The bill further avers the execution of the first, second and third, land grant income, mortgages, and bonds by Louisville, New Orleans & Texas Ry. Co., and they are made Exhibits E. F. and G., to the bill R. 25. Exhibit E. shows a mortgage to Union Trust Company, of New York, as trustee; R. 50. Exhibit F shows a mortgage to said Union Trust Company, as trustee; R. 63. Exhibit G. shows a mortgage to Edward H. Pardee and Albert Crolins, as trustees; R. 76. That the earnings have never sufficed to pay the interest on said second mortgage bonds, and nothing whatever of the interest on the said third mortgage bonds. R. 29.

That if the State Revenue Agent shall enforce the assessment now sought to be enjoined and also succeed in other like suits now pending, "such collections of said taxes will impair the obligation of the contract of purchase of said bonds, and deprive appellant of its property without due process of law and deny it equal protection of the laws, contrary to the Con-

stitution of the United States.

Par. xix. R. 29-30.

That said Taylor case is *res adjudicata* between Louisville New Orleans & Texas Ry. Co., and the State of Mississippi "as to the question of the legality and sufficiency of the privilege conferred by said Section 21, and of the constitutionality thereof, and of the right of Louisville, New Orleans & Texas Ry. Co. thereunder," and that Yazoo & Miss. Valley R. R. Co. "as its successor" would be entitled to the benefit thereof; and that being *res adjudicata* as to the State it was *res adjudicata* as to every county and municipality there of.

Par. xx. R. 30.

That said Lembert case is *res adjudicata* between Yazoo & Mississippi Valley R. R. Co., and the State "as to the sufficiency of said privilege conferred by Section 21 * * as imported into the charter of the Natchez, Jackson & Columbus R. R. Co., and its constitutionality," and, also, as to the right of enjoyment thereof by Yazoo & Mississippi Valley R. R. Co. since the sale 1890, and since the consolidation of 1892, and being *res adjudicata* as to Yazoo & Miss. Valley R. R. Co., it becomes such as to appellant, and that being *res adjudicata* against the State, it is also *res adjudicata* against every county and municipality.

Par. xxi. R. 31.

That the matters set forth in the bill create an estoppel

against the State Revenue Agent and the Railroad Commission from further prosecuting the proceedings of said assessment.

Par xxii. R. 31.

That the assessment of taxes when made as the said Railroad Commission "threatens to make the same" are required to be sent to the several clerks of the courts and to the municipalities, as a public record, and thereupon the tax collectors are required to proceed to collect the same by seizure and sale, if the same is not paid; that the Railroad Commission threatens to certify and send down said assessment, illegal though it be, to the several counties, and thereupon appellant is threatened with a multiplicity of suits. That the State Revenue Agent threatens in his legal capacity as representative of the State and said several counties and municipalities "to bring a suit for the recovery of the taxes so assessed." That for the prevention of a multiplicity of suits, this court, on its chancery side, should take jurisdiction by its writ of injunction and adjudicate the matters and questions here raised, both federal and equitable.

Par. xxiii., R. 32.

That said assessment "when made" would cast a cloud on title, and the equity jurisdiction is invoked to prevent this being done.

Par. xxiv., R. 32.

That payment under protest of the tax, and suits to recover back, would produce a multiplicity of suits, and because of the peculiar constitutions of municipalities and counties, and of recourse having to be had to legislative appropriation by the State to pay judgments, such procedure would be an inadequate remedy.

Par. xxv., R. 33.

The bill prays injunction restraining the said State Railroad Assessors from approving,and the said assessors and the clerk aforesaid from certifying the said assessment of taxes on the said railroad" formerly belonging to Natchez, Jackson & Columbus R. R. Co.," etc., "and, also, from approving or certifying said record of assessments and taxation, and from approving and certifying the valuation which they have fixed as such board of assessors aforesaid upon the said Natchez & Jackson railroad," and that Wirt Adams, State Revenue Agent shall be enjoined from beginning any suit for the recovery of any judgment or decree for said taxes, or to enforce the lien thereof, or from any proceedings looking to the subjection of said property to the payment of taxes for said years. That on final hearing said injunction be made perpetual; that the said property be decreed exempt "from State and county taxation" for said years, and that "the contract of exemption" of said 21st section by declared valid as to State, counties and municipalities for thirty years from its charter; that said as-

sessment be declared null and void and be cancelled as a cloud on the title of appellant.

R. 33-4.

A writ of injunction as prayed was issued. R. 87-8. But by consent it was treated as a restraining order.

Appellees, except Yazoo & Miss. Valley R. R. Co., moved to discharge the restraining order, because:

1st. That they have no authority to distrain or sell anything for taxes, and were merely performing duties imposed by law, and a suit against them, or any of them, is a suit against the State of Mississippi, and forbidden by the 11th amendment to the Constitution of the United States.

2nd. Said Railroad Commission, in making said assessments, act judicially and cannot be enjoined; that the State Revenue Agent cannot act until after the assessments are made, approved and the rolls sent to the various counties as required by law.

3rd. Said injunction was prematurely applied for.

4th. Plaintiff shows no right to file this bill under the 94th equity rule, or otherwise.

5th. The court has no jurisdiction.

6th. The bill shows no right to an injunction.

7th. There is no equity on the face of the bill. R. 89. Appellant moved for an injunction. R. 89. Evidence was adduced on the hearing of these motions.

The record of the State Railroad Commission was introduced and it showed personal service on Yazoo & Miss. Valley R. R. Co., and Natchez, Jackson & Columbus R. R. Co. R. 93, and that Yazoo and Miss. Valley R. R. Co. appeared and denied that the property was subject to assessment; and, if subject to assessment, that the assessment could be made against Yazoo & Miss. Valley R. R. Co.; it denied that the property escaped taxation for want of assessment; it averred that Natchez, Jackson & Columbus R. R. Co. and Louisville, New Orleans & Texas Ry. Co. were extinct; that if liable to be assessed for taxation that Yazoo & Miss. Valley R. R. Co. could not make the schedules. R. 93; and it objected to the proposed assessment. Because of section 21, extended to Natchez, Jackson & Columbus R. R. Co. by act of August 8, 1870; followed by the act of March 12, 1884 (Laws 1884, p. 29), and by the act of February 19, 1890. (Laws 1890, p. 675.) And because said act of 1890 was carried out by a sale of said railroad to the Louisville, New Orleans & Texas R. R. Co., as authorized.

And because in 1892 said Louisville, New Orleans & Texas Ry. Co. and Yazoo & Miss. Valley R. R. Co. were consolidated as authorized by their respective charters.

And because the payments required by the 21st section were annually made ,and the affidavits required thereby regularly made, and delivered to the tax collectors, and receipts

for said taxes received conformably to law.

Because said railroad has never been enabled to declare the dividend provided in said 21st section.

Because by Lambert's case the entire question has been judicially determined in favor of said company, and is *res adjudicata* of these matters.

R. 94.

The Railroad Commission overruled defendant's objection, and after hearing the evidence, it adjudged that the property of Natchez, Jackson & Columbus had escaped taxation from 1886 to 1891 inclusive, by reason of not being assessed, and that it be assessed at the amounts set opposite on the assessments rolls etc., "and on demand of said Yazoo & Mississippi Railroad Company by its attorney, it is ordered that said assessments so made, remain on file for thirty days for the filing of objections thereto." R. 95. No objections were ever filed. Ctf. Clk. R. 97.

The record in Miss. Mills vs. Cook, was read in evidence; the bill only is transcribed, but by agreement, R. 90, it is shown that the bill was demurred to, the demurrer was sustained March 12, 1878—incorrectly stated 1873—and appeal taken; and that the rest of the record may be taken from the 56 Miss. Report 40; and that the case was decided on appeal at the April term 1878. That bill averred that in 1872 the Legislature had declared "by a general law," passed in order to invite

and stimulate manufacturing enterprises in the State and to diversify and multiply its industries, that the State "hereby agrees with any and all maufacturing companies in this State * * * that all taxes to which said company or companies shall be subject for the period of ten years, should be appropriated and set apart and shall be applied to the payment to the debts and liabilities which any of said companies may have incurred in the constuction of factories," etc., and following generally the terms of said 21st section as to payment by affidavit. That said Miss. Mills had accepted said act as amended by the act of 1873, and on the faith thereof had constructed its factory. That said mills owned outlaying lands, though not by way of investment. That the act of 1877 repealed said acts of 1872 and 1873 as to all property except the mill proper, its site, buildings, stock and machinery. That the tax collector, Cook, was willing to accept the affidavit in payment of the taxes on the mill proper, its site, etc., but refused to accept the affidavit for the taxes on these outlying lands. Avers that the repealing act of 1877 impaired the obligation of complainants contract in violation of the Federal Constitution. Prays, injunction against the collection of the taxes on these outlying lands. A general demurrer to this bill was sustained, March 12, 1878. The Miss. Mills appealed, and at the April term, 1878, of the State supreme court the decree sustaining the demurrer was affirmed.

10129

R. 101-107. R. 90, 56 Miss., Rep. 40.

The record in Lambert's case was read in evidence. The bill in that case was filed by Natchez, Jackson & Columbus R. R. Co., as a "going" concern, joining Yazoo & Miss. Valley R. R. R. Co., as grantee, as complainant against Lambert, sheriff of Adams county, seeking to restrain by injunction the State and county taxes of 1891 and 1892 upon that part of the property of Natchez, Jackson & Columbus R. R. in Adams county, upon the ground; that by said act of Aug. 8, 1870, said 21st section was extended to Natchez, Jackson & Columbus R. R. Co., and that said charter was amended by the act of March 5, 1878, and by it, also, the benefits of said 21st section were conferred, and that this 21st section was a contract "irrepealable and inviolable." That Natchez, Jackson & Columbus R. R. Co., on the faith of these acts invested its funds in and constructed its railroad from Natchez to Jackson, and since its construction has employed its capital in the operation and maintenance thereof relying upon said contract, and reposing in the belief" that the taxes to which it was subject, would be appropriated by the State of Mississippi to the payment of its debts and liabilities incurred in the construction of said railroad, and as provided for by said 21st section, R. 113, and that "said contract and agreement on the part of the State of Mississippi, went far beyond the mere privilege of an exemption from taxation, the State having solemnly agreed in said

contract "and by the acts of the legislature aforesaid, that if said company should construct a railroad as provided for in its charter and amendments thereto and should incur debts and liabilities, in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of eight *per cent.* upon its capital stock over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of incorporation, in 1870, should be appropriated by the State of Mississippi to the payment of the debts and liabilities incurred by the company in building said road;" R. 113, and that by a sale of its property, rights franchises, privileges and immunities under the act of 1890 said immunity from taxation passed to the purchaser, Louisville, New Orleans & Texas Ry. Co.; and that by said consolidation of Oct. 25, 1892, said immunity from taxation passed to Yazoo & Miss. Valley R. R. Co.; that on Oct. 25, 1892 'the Louisville, New Orleans & Texas Ry. Co., was merged into and consolidated with the Yazoo & Miss. Valley R R. Co., and that by said merger and consolidation the capital stock, franchises, grants, privileges and immunities * * * * of Louisville, New Orleans & Texas Ry. Co., *was* merged into and became the property of Yazoo & Mississippi Valley Railroad Company:" R. 113-4; that the franchise to be a corporation did not pass by said sale under the act of 1890, and that since that sale Natchez, Jackson & Columbus R. R. Co. has preserved its

organization, had meetings of stockholders and directors, and was a going corporation; that the amount of said taxes for 1891 and 1892 had been applied by Natchez, Jackson & Columbus R. R. Co., to the debts of construction of Natchez, Jackson & Columbus R. R. Co.; that the tax collector refused to accept the affidavit of either Natchez, Jackson & Columbus R. R. Co., or Louisville, New Orleans & Texas Ry. Co. (Yazoo & Miss. Valley R. R. Co.) in payment of said taxes; and prays injunction. Ex. D. and E. to this bill are affidavits of Cooke, Pres't of Natchez, Jackson & Columbus R. R. Co., stating that in 1891 and in 1892 said Natchez, Jackson & Columbus R. R. Co, had applied the amount of the taxes in each year to its debts of construction; the affidavits conforming to said 21st section. R. 119, 123. Also like affidavits of Pres't of Louisville, New Orleans & Texas Ry. Co. R. 120, 124.

The bill was demurred to, R. 127, the demurrer sustained March 23, 1893. R. 91. There was, also a plea of *res adjudicata* supported by a record wherein Louisville, New Orleans & Texas Ry. Co., as complainant, had sought to enjoin said Lambert from subjecting its property acquired from Natchez, Jackson & Columbus R. R. Co., to the payment of State and county taxes upon substantially the same averments as in the bill of Natchez, Jackson & Columbus R. R. Co., vs. Lambert, *supra* except that it was averred that the taxes had been paid for 1891 by the proper affidavit by the officers of Louisville,

New Orleans & Texas Ry. Co. of the application of the amount of said taxes on the debts of construction of the said Louisville, New Orleans & Texas Ry. Co. R. 90-1. That an appeal was taken in said Lambert case to the Supreme Court returnable April 17, 1893, and the case was decided at the April term, 1893, of said court. It was agreed that the rest of said record might be taken from 70 Miss. 779. R. 91. The Supreme Court reversed the decree sustaining the demurrer, and held the plea of *res adjudicata* not good, and remanded the cause for answer.

It was agreed that copies of the decision of the Supreme Court of Mississippi rendered on June 20, 1898, and November 22, 1898 in "Wirt Adams, vs. Yazoo & Miss. Valley R. R. Co. et al.," may be used from the pamphlets "Mississippi Decisions" and need not be copied. This case with the opinions is now in this court being No. 244 on the docket of this October term, 1899 of this court. R. 90.

Upon the hearing of the motions to discharge and for injunction the Circuit Court "finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction" it by interlocutory decree refused to grant the injunction, and discharged the restraining order. R. 128.

Thereupon appellant appealed from said interlocutory decree to the United States Circuit Court of appeals, fifth cir-

cuit, and assigned for error. 1. Because "on the bill and proofs" the restraining order should not have been discharged: 2. Because "on the bill and proofs" the temporary injunction should have been granted. R. 129.

The court of appeals after a full hearing on the merits, of its own motion, dismissed the appeal for want of jurisdiction. 93 Fed. 852.

Thereupon appellees, except Yazoo & Miss. Valley R. R. Co., entered a special appearance, and moved to dismiss the bill, solely because the injunction had been refused, and the appeal for that decree had been by the court of appeals dismissed for want of jurisdiction, and this motion was sustained and the bill was dismissed. R. 133.

Thereupon appellant prayed an appeal to this court because of said decree refusing jurisdiction, under Section 5, of the Judiciary Act of March 3, 1891; and assigned for error, that the court erred in dismissing the bill "for want of jurisdiction to entertain the same." R. 134. Thereupon the district judge certified, after reciting meagerly the record, as follows: "Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

1. That the complainant in its original bill showed no jurisdiction on the ground of the diversity of citizenship. Defendants claim that complainants' interest was derivative

through the Yazoo & Mississippi Valley Railroad Company, and that the complainant had no right to raise jurisdiction in the Federal courts by making the Yazoo and Mississippi Valley Railroad Co. a party defendent in the cause.

2. That the complainant by its original bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.

3. That there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi and in violation of the 11th amendment to the Constitution of the United States.

The court having dismissed the bill on the ground of want of jurisdiction, the foregoing three questions, arising upon the pleading, the process, and the evidence are hereby certified to the Supreme Court of the United States for its decision in c nformity with the fifth section of the act of Congress of the year 1891." R. 140.

After the dissolution of the injunction, Wirt Adams, State Revenue Agent, brought suit in the Chancery Court of Hinds County, State of Mississippi, to enforce the lien of the taxes upon said assessment against the property assessed to which suit Yazoo & Mississippi Valley R. R. Co. and Illinois Central Railroad Company were parties defendant and they appeared and defended by answer, and such proceedings were had that a final decree on the merits was made by said court enforcing

10132

the lien of the taxes upon the property assessed but not *in personam* except as to costs on the day of February, 1900, and that decree stands unreversed, and is set up herein by affidavit as *res adjudicata* of this appeal.

Appellees, except Yazoo & Mississippi Valley Railroad Company, move the court to dismiss or affirm.

BRIEF.

I.

JURISDICTION.

This appeal was taken under paragraph 1, of the fifth section of the Judiciary Act of 1891. R. 134, 140. The certificate of the question of jurisdiction, R. 140, recites "that the question of the jurisdiction of this court was in issue in said cause * * namely:

1. That the complainant in its original bill showed no jurisdiction on the ground of diversity of citizenship, * * *.

2. That the complainant by its orignial bill showed no jurisdiction in this court because of the subject matter stated, inasmuch as the bill set forth no proper Federal question.

3. That there was no jurisdiction in this matter because

the bill was a suit against the State of Mississippi in violation of the eleventh amendment to the Constitution of the United States. The court having dismissed the bill on the ground of the want of jurisdiction, the foregoing three questions, arising upon the pleadings, the process and the evidence, are hereby certified to the Supreme Court," etc.

This appeal should be dismissed because:

1. This certificate is fatally defective, in that;

(*a*). It does not explicity state the question of Federal jurisdiction actually decided, if any, by the circuit court. It leaves the court to search through the record for the federal question decided, if any, and thereby seeks to convert an appeal by *certificate* into a general appeal. Such a certificate is fatally defective.

Maynard vs. *Hecht,* 151, U. S., 326-7-8.

(*b*). Said certificate does not state that the court decided the case on the question of the jurisdiction of the court as a Federal Court. It states that questions of jurisdiction were in issue, and that the bill was dismissed for want of jurisdiction, and that these three questions are certified for decision. The first question is one of jurisdiction because of diversity of citizenship. The circuit court of appeals has final jurisdiction of that question.

American Const. Co. vs. *Jacksonville, etc., Ry Co.*, 148, U. S., 372.

Press Pub. Co. vs. *Monroe,* 164, U. S., 105.

Benjamin vs. *New Orleans,* 169, U. S. 161.

And this even though, as here, by the third question certified, the defendent invokes the constitution and laws of the United States.

Press Pub. Co. vs. *Monroe,* 164, U. S., supra.

Boogmeyer vs. *Idler,* 159, U. S., 408

The second of the three questions certified is that there was no jurisdiction of the subject matter of the bill "inasmuch as the bill set forth no proper Federal question." The essential thing, as a predicate for the jurisdiction of this court by certificate under paragraph 1, is omitted from this certificate, viz: that the decision of the court was based upon the question of jurisdiction of the court as a Federal court. "No proper Federal question" conveys no definite idea of what Federal questions, if any, mere in issue; whether they were those arising under the constitution and laws of the United States, and, therefore, excluded from the terms of this certificate by paragraphs 4 and 6 of said Section 5, of said acts; or whether the pleadings defectively stated the cause of action in its Federal aspect; or whether the court was of opinion that there was no equity on the face of the bill, and, therefore, the Federal questions averred were not "proper" for decision under the case stated—whatever may have been in the mind of the court the certificate fails to specify it.

The third question certified arose on the defendants' objection to the jurisdiction as being a suit against the State contrary to the 11th amendment. So far as the question of jurisdiction is concerned this, being a defense, could not avail to make the question one for decision upon certificate by this court, but in such case the jurisdiction would pertain to the appellate jurisdiction of the court of appeals.

Press Pub. Co. vs. *Monroe,* 164, U. S., supra.

Boogmeyer vs. *Idler,* 159, U. S., supra.

Hence, *upon its face* the certificate is fatally defective.

2. The interlocutory decree of the circuit court refusing the injunction and discharging the restraining order "finds that the complainant has shown no right to invoke the jurisdiction of this court and further being of opinion that this court has no jurisdiction," etc. R. 128. The motion to dismiss the bill was *solely* because the injunction had been refused. R. 133. This finding was dual. It was primarily a finding that the complainant had shown no cause of action entitling it to invoke the extraordinary writ of injunction from a court of equity; and, further, that is, secondarily, " being of opinion that the court has no jurisdiction." The first or primary finding of this decree, viz: that the complainant has shown no right to invoke the jurisdiction necessarily assumes the exercise of the jurisdiction or powers of the court as a predicate for that finding. The denial was not because the court

had no power to grant the relief; but because, with all power in the premises, the complainant had not made out such a case as would entitle it to invoke the power or jurisdiction of the court. In other words, there was a want of equity. The secondary or further expression of opinion that the court had no jurisdiction supplements the first finding by the declaration that the court has no jurisdiction. Succintly stated the court says to the complainant: on the case stated you are not entitled to relief, and this without regard to jurisdiction; but if you have made out a case, then, the court, further, finds that it has no jurisdiction. Thus, it is clear from the decree itself that the injunction was refused because the court, as a court of equity, decreed that the complainant, aside from any question of jurisdiction of the court as a Federal court over the subject matter or the parties, had not made such a case as entitled it to relief under the principles of equity jurisprudence.

Where the ground of the decision was not rested upon the question of the jurisdiction of the Federal Court as a Federal Court, but upon the jurisdiction of the court as a court of equity, this court has no jurisdiction.

Smith vs. *McKay*, 161, U. S., 355.

Blythe vs. *Hinckley*, 173, U. S., 501.

Third St &c vs. *Lewis*, 173, U. S., 460.

U. S. vs. *Swan*, 65, Fed., 649.

Worlds Columbia. Ex. vs. U. S., 56, Fed., 654.

There were numerous questions of general equity jurisprudence involved: 1. Whether the complainant, a third person, could enjoin a court of competent jurisdiction, with jurisdiction of the parties, in process of trying a cause, from rendering a judgment or decree, against the party upon the facts of the case so found. 2. Whether a stockholder, as such, could assert the alleged right of the corporation, without averment of fraud or refusal of the corporation to protect its own interests. 3. Whether a mortgagee is not bound by an assessment of taxes made upon notice to the mortgagor, and whether as *bona fide* purchaser such mortgagee has any right superior to that of the mortgagor. 4. Whether such privity between complainant and Yazoo & Miss. Valley R. R. Co., existed as made the exclusive remedy of complainant against said assessment, when made, that of certiorari. 5. Whether the judgment of said Railroad Commission was not *res adjudicata* of the matters of said alleged exemption. 6. Whether the benefits of said 21st section, if then unrepealed, passed to Louisville, New Orleans & Texas Ry. Co., under the deed authorized by the Act of 1890, and whether the Lambert case was *res adjudicata* of that proposition. 7. Whether, if there was any difference, the Lambert case was not *res adjudicata* of the interpretation of 21st section being an exemption from taxation and not a contract of appropriation as averred. 8. Whether there was any conisideration for the grant of the said

21st section. 9. Whether the benefits of said 21st section were not lost under the operation of Section 180, of the Constitution of 1890 by the consolidation of Louisville, New Orleans & Texas Ry Co., and Yazoo & Miss. Valley R. R. Co., in 1892, under the powers of consolidation contained in their respective charters granted prior to 1890. 10. Whether under the Constitution of 1869, Sections 5, 13, 14 and 20, the grant of said 21st Section was not unconstitutional and void *ab initio*. 11. Whetherthe amount of the taxes had been paid by the payment of construction debts. 12. Whether the assessment would create a cloud on title, or avoid a multiplicity of suits, and whether the remedy at law was not clear and adequate. 13. Whether according to the express terms of said 21st section it was not necessary to make an assessment of the property before the right to pay by the affidavit of payment of construction debts could arise, etc., etc.

3. Aside from the diversity of citizenship averred, the sole basis for jurisdiction in the court as a Federal Court relied on was that said 21st section was a contract within the protection of the Federal Constitution, and that said decision of June 20, 1898, by the Supreme Court of Mississippi (the style of the case is not given, but, in fact, it was the case of Yazoo & Miss. Valley R. R. Co. vs. Adams, State Revenue Agent, No. 244, on the docket of October term, 1899, of this court) had held "amongst other things" that the constitution of

1869 meant that all property of corporations for pecuniary profits should be subjected to taxation and thereby overruled the previous decision of Miss. Mills vs. Cook and other cases construing said 21st section, and thereby overturned the settled construction of said 21st section, upon which appellant and those through whom it claims had acted and made the contracts of purchase and mortgage set forth in the bill; and that by this assessment sought to be enjoined the Railroad Commission and the Revenue Agent by the threatened suit upon said assessment were seeking to give effect to said decision in violation of the Federal Constitution. R. 21. Thus, the gravamen of complaint in respect to Federal questions was that rights guaranteed under the Constitution of the United States were being denied. Such cases do not come within paragraph one of Section 5 of the Judiciary Act of 1891, but are expressly provided for by paragraphs four and six thereof; and, hence, the remedy by appeal upon certificate of jurisdiction does not apply. That Federal Courts have jurisdiction of questions arising under the Constitution and laws of the United States is a question too plain to ever arise for decision. But the question of whether or not a right asserted is denied in violation of the Federal Constitution is one of interpretation of the right asserted in its relation to the Federal Constitution, and is not a question of the jurisdiction of the Federal Court.

Paragraphs four and six of Section 5, would exclude questions arising under the constitution and laws of the United States from being embraced in paragraph one. *Expressio unius, exclusio alterius.*

4. The jurisdiction pertained to the court of appeals under Sec. 6 of said judiciary act of 1891 to finally decide all questions of equity jurisdiction proper. This jurisdiction applied to appeals from interlocutory decrees granting or refusing injunctions.

Smith vs. *McKay*, 161, U. S., 357-8.

5. If the jurisdiction of the court is involved the party "must elect whether he will take his writ of error or appeal to the Supreme Court upon the question of jurisdiction alone, or to the circuit court of appeals on the whole case. If the latter then the circuit court of appeals may, if it deems proper, certify the question of jurisdiction.

McLish vs. *Roff*, 141, U. S., 661.

Maynard vs. *Hecht*, 151, U. S., 324.

U. S. vs. Jahn, 155, U. S., 109.

In re Lehigh Co., 156, U. S., 326.

Calvin vs. *City of Jacksonville*, 157 U. S., 368.

Both remedies, an appeal to the circuit court of appeals from the interlocutory decree, and an appeal from the circuit court from the final decree, are not available, because the whole appelate jurisdiction is distributed between this court and the

court of appeals.

United States vs. *Rider,* 163 U. S., 132.

Bardes vs. *First National Bank,* MSS. op. Dec. 22, 1899.

6. By the appeal to the circuit court of appeals from the interlocutory decree refusing the injunction and discharging the restraining order jurisdiction of the "whole case" was vested in that court; because,

a. The interlocutory decree was essentially a final decree; i. e., only the questions involved in the decree upon the interlocutory decree were or could have been presented and decided by the final decree.

Smith vs. *Walker,* 57 Mich., 456.

Toledo vs. *Detroit,* 61 Mich. 9.

Englewood Con. Co. vs. *Chicago R. R. Co.,* 117 Ill., 611.

(b) The merits of the *whole case* "on bill and proofs" were drawn in review by the assignment of errors. R. 129. That court, after a full hearing, *of its own motion,* dismissed the appeal. 93, *Fed.* 852. Such appeal carried the *whole case* to that court upon the law and the facts.

Maynard vs. *Hecht,* 151 U. S., 326-7.

Lake Nat. Bank vs. *Walfeborough,* 78 Fed. 517.

(c) The record presents questions of general equity juris-

10137

prudence and of the application of the constitution and laws of the United States for decision, and these questions of equitable cognizance are *in limine*, and were actually decided in the finding that "the complainant has shown no right to invoke the jurisdiction of this court." R.128.

Maynard vs. *Hecht*, 151 U. S. 324.

Green vs. *Mills*, 69 Fed., 852.

Caler vs. *Granger Co.*, 74 Fed., 16.

Crabtree vs. *Madden*, 54 Fed., 426.

Rust vs. *United Waterworks Co.*, 70 Fed. 129.

City of Indianapolis vs. *Cen. Trust Co.*, 83 Fed. 529.

In Green vs. Mills, 69 Fed. *supra*, it was held, the Chief Justice delivering the opinion, that where the jurisdiction rested on a Federal question, viz: the validity of State laws challenged as violating the Federal Constitution; but, conceding the jurisdiction, the question at the threshold was one of equitable cognizance, the Circuit Court of Appeals had jurisdiction—and this whether the dismissal was on that ground or not.

In such case the Circuit Court of Appeals has jurisdiction of the *"whole case."*

Smith vs. *Vulcan Iron Works*, 165 U. S., 518.

Kirwan vs. *Murphy*, 170 U. S., 209.

Lake Nat. Bank vs. *Walfebrough*, 78, Fed. 517.

In the brief of opposite counsel in No. 320, p. 11, it is con-

ceded that the Circuit Court of Appeals had jurisdiction on that appeal of the whole case; but they argue because that court dismissed the appeal that court had no jurisdiction. In other words, that the erroneous decision of that court as to its jurisdiction could affect the decision of this court upon its own jurisdiction.

(d) The validity of the State statute, 21st section, must first be determined by a judicial construction of the Constitutions of 1869 and of 1890, and when this has been done, if found constitutional or valid, then the questions arising under the Federal Constitution might be involved, and in such case, jurisdiction rests with the Circuit Court of Appeals.

City of Indianapolis vs. *Cen. Trust Co.*, 83 Fed., 529.

1. The validity of said 21st section, under Art. XII., Secs. 13 and 20 of the Constitution of 1869 lies at the foundation of the case. Sec. 13 ordains: "The property of all corporations, for preliminary profits, shall be subject to taxation, the same as that of individuals." Sec. 20: "Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law" Said 21st section, enacted in 1870, purported to grant by *special* act to a *special* corporation an irrepealable immunity from taxation for thirty years, upon condition that its profits would not enable it to declare a dividend of 8 per cent. upon its capital stock, and that it would apply the amount of its taxes

annually upon its debts of construction.

Construing said Secs. 13 and 20 in the Constitutions of other States, this court has held that their proper interpretation is that the taxation of corporate property is mandatory upon the Legislature, and that special exemptions cannot be granted.

Louisville vs. *Palmes* 109 U. S., 248.

St. Louis vs. *Berry*, 113 U. S., 475.

Schurze vs. *Cook*, 148 U. S., 408.

Keokuk vs. *Missouri*, 152 U. S., 310-12.

This construction of the nature of the contract by this court would be followed on any appeal from a Federal court, no matter what construction of these sections of the Constitution might be made by the Sate court.

Gelfe vs. Dubuque, 4 Wall.

U. S. vs. *Morrison*, 4 Pet., 124.

Green vs. Neal, 6 Pet. 129.

Leffingwell vs. *Warren*, 2 Black, 509.

Citizens Sav. Bank vs. *Owensboro*, 173 U. S., 643.

Hence, so far as the jurisprudence of the Federal courts is concerned, it could not raise a federal question for the State court to abandon an erroneous construction of its own constitution and to conform to the interpretation adopted by the Supreme Court of the United States. It is complained in the bill that the State Supreme Court "*amongst other things*," de-

cided, by its decision in Yazoo & Mississippi Valley R. R. *et al*, vs. Wirt Adams, State Revenue Agent, No. 244 on the docket of this court, that the constitution of 1869 meant that the property of corporations for pecuniary profit should actually be subjected to taxation," etc. R. 21. An appeal to this court *at any time* from a Federal court of the State, would have met the same decision from this court as that delivered by the Supreme court of Mississippi, June 20, 1898, on this question.

It is to be carefully noted that the bill in this most essential feature is not as precise in its allegations of the nature of the decision in Yazoo & Mississippi Valley R. R. Co., vs. Adams, said No. 244, as it should have been to have put the court in possession of all of the decision of the State Supreme Court. The bill specifically averred that Mills vs. Cook was an interpretation of Section 13, Art. XII of Const. 1869, R. 8, and that these other cases had followed Mills vs. Cook. But it failed to aver that the decision of June 20, 1898, said No. 244, was an interpretation of Secs. 13 and 20, of the Constitution of 1869; hence in paragraph XV, p. 21, the pleader avers that the court held that the Constitution of 1869 meant that the property of corporations for pecuniary profit should actually be subjected to taxation, etc. The effect of Section 20 on Section 13 had never been decided in a case of a special, irrepealable, exemption to a special corporation in any of the cases relied on and this was an essential part of that decision as shown by the opinion delivered in Nov. 1898 in that

case. One of the things decided "amongs other things," was that the said 21st Section was unconstitutional because expressly made *irrepealable* in violation of Secs. 13 and 20, Const. 1869. Mills vs. Cook contained no irrepealable clause; on the contrary the sole question for decision there was whether the Act of 1877 repealing in part the Acts of 1872 and 1873 was not unconstitutional, and the court decided that the repealing act was constitutional. In fact, the bill avers that all exemptions were repealable. R. 13.

Therefore, the question arising under the Constitution of 1869, in force when said 21st Section was extended to Natchez, Jackson & Columbus R. R. Co., Aug. 8, 1870, must be first decided before any Federal question can arise. For, if unconstitutional under the State constitution, on Federal question could arise.

2. While the bill avers that there was no repealing statute of the said 21st Section the court will take judicial notice of the statutes of the State, and, even of charters, Unity vs. Burrage, 103 U. S., 447, and it will find that the said 21st Section, being an amendment to the charter of Natchez, Jackson & Columbus Railroad company, was repealed by chapter 42, Acts of 1875, p. 66, as was expressly held in Lamberts case, 70 Miss., 779; and that by the Act of 1878, chap. 116, p. 233, said exemption was sought to be restored; and it was so held in Lambert's case, but the court overlooked the Act of 1878, chap. 11, p. 87,

amending said Act of 1875, and imposing taxes on railroad property as a class, and did not there consider or decide the effect of said chap. 11, approved the same day as chap. 116, upon chap. 116 under Sec. 20, Art. XII of the Constitution of 1869. These questions were considered and decided by the state chancery court in the decree set up in the affidavit herein, and the court there held that said chapter 11 repealed said chapter 116, and that said chapter 116 was unconstitutional under the Constitution of 1869, and especially so because of the enactment of said chapter 11. Said 21st Section was repealed by the Code of 1880, chap. 10, as was held in Lamberts case and by said chancery court. It was held in Lamberts case that the exemption was restored by chapter 22, Acts of 1884, p. 29. This was doubted in said No. 244, and, also, by said chancery decree but neither the Lambert case nor No. 244 interpreted said Act of 1884 in its relation to the Constitution of 1869 but by said chancery decree it was adjudged that if the exemption was re-enacted thereby, that such statute violated the constitution of 1869. If existent it was repealed by the Act of 1886, chapter 2, page 23 as was decided by said No. 244 and by said chancery decree. It was said in Lamberts case that chap. 2, Acts 1890, p. 12, recognized said exemption and by said chancery decree it was held that by chap. 2, Acts 1890, the said exemption, if then existent, was repealed, and that if it be said that it was recognized thereby that such recognition violated

said Constitution of 1869. So, the question of the existence or not of the exemption from 1886 to 1891 and whether repealable and repealed, or not, under the Constitution of the State, must be first determined. For, if repealable, notwithstanding the irrepealable declaration of its terms, under Secs. 13 and 20 of the Constitution of 1869, and, if in fact it was repealed, no Federal question could arise.

In Lamberts case, so much relied on by the bill as *res adjudicata*, it was expressly held that said 21st Section was an exemption from taxation; that it was repealable; that this exemption had twice been repealed, and that it was re-enacted as an exemption by the said Act of 1884.

3. The bill avers that said 21st Section was not an exemption but a contract of appropriation whereby the State agreed to appropriate an amount equal to the amount of taxes out of the State treasury and to pay the amount upon the debts of construction of the railroad company, the company acting as paymaster for the State; that this was a special and peculiar mode of paying taxes.

The very object of Secs 13 and 20, Art. XII, Const., and Secs. 181 and 112 Const. 1890, was to prevent *special* and *peculiar* modes of paying taxes. Sec 13 declared that corporate property shall be subject to taxation the *same* as that of individuals; Sec. 181 declared to the *same extent* as that of individuals; and Secs. 20 and 112 that taxation must be equal

and uniform; and Secs. 5, Const. 1869 provides: "The credit of the State shall not be pledged or loaned in aid of any person, association, or corporation;" and Sec. 14 provides: "The legislature shall never authorize any county, city or town, to become a stockholder in or lend its credit to any company, association or corporation, unless two-thirds of the qualified voters * * shall assent thereto. Whether the alleged special and peculiar mode of paying taxes by an alleged appropriation of the amount of the taxes—State and county and municipal—by the State to the debts of construction of the railroad company was not a violation of each of these provisions of the State Constitution must be first determined, for, if violative of the State constitution, no Federal question could arise.

These questions of construction of the State statutes and constitution at the foundation of the right asserted, and which must be first determined before the exigency for the decision of a Federal question could arise, vested jurisdiction of the "whole case" in the Circuit Court of Appeals.

(e) By the appeal to the Circuit Court of Appeals from said interlocutory, really final, decree, the appellant *made an election* within the meaning of the statute to invoke the jurisdiction of that court upon the "whole case," and it cannot now resort to this certificate of the question of jurisdiction.

McLish vs. Roff, 141 U. S. 668.

Maynard vs. *Hecht*, 151 U. S., 326.

Smith vs. *Vulcan Iron Works,* 165 U. S. 518.

Kirwan vs. *Murphy,* 170 U. S. 209.

(f) With the "whole case" before it if the Court of Appeals deemed the question of jurisdiction a controlling one, that court should have suspended the proceedings until that question could have been certified to this court for instructions.

U. S. vs. *Jahn,* 155 U. S. 109, 114.

New Orleans vs. *Benjamin,* 153 U. S. 411.

As the Circuit Court of Appeals did not so certify, but, of *its own motion,* dismissed the appeal for want of jurisdiction and thereby defeated appellant's election, the remedy of appellant was by *certiorari* from this court to the Circuit Court of Appeals.

Law Ow Bew vs. U. S., 144 U. S. 57.

(g) Even though this decree of the Circuit Court of Appeals is erroneous on the question of jurisdiction, after the term it is unassailable.

Gaines vs. *Rugg,* 148 U. S., 241.

(h) This appeal from the circuit court on certificate of jurisdiction is essentially a collateral attack upon the decree of the circuit court reversed on appeal to the Circuit Court of Appeals.

Dowell vs. *Applegate,* 152 U. S. 327.

Franklin vs. *German Bank,* 142 U. S. 93.

The legal effect of the decree of the Circuit Court of Ap-

peals dismissing the appeal was to leave adjudged every question involved in the decree of the circuit court within the appellate jurisdiction of the Court of Appeals presented by the record. And, also, it adjudged that the Court of Appeals did not elect to certify the question of jurisdiction to this court. These questions thus became *res adjudicata,* and cannot be reversed or annulled by attempting to reverse the original decree of the circuit court by this appeal. The decree of the circuit court is conclusively protected from attack by appeal by the decree of the Circuit Court of Appeals. That decree, if any, is the only decree to be assailed by appellate proceedings from this court.

7. In Taylor vs. L. & N. R. R. Co., 31, C. C. A., 537 much relied on by appellant in the court below, the circuit court took jurisdiction as a court of equity to enjoin the certificate of the assessment roll because of a systematic, fraudulent increase by the Railroad Assessors; the equities involved were: 1. Avoidance of multiplicity of suits: 2. That as the tax was excessive, and not void *in toto,* it cast a cloud on title: 3. That the assessment as made was fraudulent: 4. That the persons enjoined were acting not as State officers, but as individuals, in doing a ministerial act, certifying the assessment, whereby a legal tax law was being executed in an illegal manner.

These were all questions of which the Circuit Court of Appeals had jurisdiction and the questions here involved as far

as they are of the same nature as in that case are conclusively settled by the decree of the Circuit Court of Appeals; and, if not, they could not be reviewed here on certificate of jurisdiction.

8. The bill avers, par. XVI. V, that it was the duty of the State Railroad Assessors, under the Code of 1880, to have assessed railroads for taxation for the years 1886 to 1891 inclusive, and that the reason said assessment was not made was that said assessors regarded the property of Natchez, Jackson & Columbus R. R. Co., as exempt from taxation and not required to be assessed; and by paragraphs IV,, p. 6, and X that said 21st Section provided a special and peculiar method of granting a special and peculiar privilege "in respect to the payment of all taxes." "put in the form of an appropriation made by the legislature out of its public treasury, equal in amount to what would be the taxes assessed against each respective company, and authorizing the same to be paid by said railroad companies, as paymaster of the State, to the creditors of said railroad companies respectively holding construction debts, the substantial effect thereof being the same as if the taxes had been covered into the treasury of the State, and by the State paid in extinguishment of the railroad's construction liabilities."

The bill, par XVII, does not deny, but practically admits,

that no assessment of these taxes has ever been made. It avers that the decisions of the State court relied on have defined said 21st Section as an exemption, but that heretofore the necessity for properly construing it as a contract of appropriation had not arisen, and appellant now insists that it is a contract of appropriation.

As such contract of appropriation, and under this alleged construction of said 21st Section, it was a necessary condition precedent that the amount of the taxes should be ascertained by assessment in order that the State might know what amount of money was to be appropriated; and whether the amount paid on construction debts was equal to the amount of taxes assessed. This was, as alleged, a peculiar and special mode of payment of the taxes, and to execute this peculiar mode of payment, the amount of indebtedness to be paid must first be ascertained, and this could only be done by assessment. But the gravamen and prayer of the bill is to enjoin the State Railroad Commission as Railroad Assessors, from making this assessment; in that, after the Commission had found that the property was liable to taxation, and had escaped taxation by reason of not being assessed, and had found the value thereof for the purposes of assessment, and while the assessment rolls were at the instance of Yazoo & Mississippi Valley R. R. Co., lying open for objections to be filed, this bill was filed to enjoin, the Commission from approving

these assessment rolls or certifying them to the clerks as such assessment; R. 33; and the restraining order enjoins *approving* the assessment rolls or certifying the same. R. 88. The bill further prays that the property be "decreed to be exempt from all State and county taxation" for said years.

These averments of the bill affirmatively show that the assessment was an essential perequisite and that this proceeding to restrain the Commission from making it could not be maintained.

The circuit court could well find that the complainant did not show any right to invoke the jurisdiction of that court. Such finding upon this question would pertain for review to the appellate jurisdiction of the Circuit Court of Appeals, as it lies at the threshold, and controls the "whole case."

Maynard vs. Hecht, 151 U. S. 324, supra.

Green vs. Mills, 69 Fed. 852, supra.

Smith vs. *Vulcan Iron Works*, 165 U. S. 518.

Kirwan vs. *Murphy*, 170 U. S. 209.

Lake Nat. Bk. vs. Wolfeborough, 78 Fed. 517.

Appellant could not give rise to a Federal question growing out of the refusal to recognize its rights in regard to the means of payment of said taxes until the taxes had been assessed.

9. The record shows that the Yazoo & Mississippi Valley R. R. Co. and the Natchez, Jackson & Columbus R. R. Co.,

were parties to the proceedings before the Railroad Commission and that Yazoo & Mississippi Valley R. R. Co., appeared before that tribunal and objected to the assessment, because: 1. Said 21st Section was extended by the Act of 1870, p. 675, to Natchez, Jackson & Columbus R. R. Co. by an amendment to its charter; and that it was re-enacted by the Act of 1884, p. 29, and by the Act of 1890, p. 675: 2. Under the Act of 1890, p. 675, the property, franchises and immunities of Natchez, Jackson and Columbus R. R. Co., were conveyed by it by deed to Louisville, New Orleans & Texas Ry. Co., in 1890; and that under their rescpective charters of Louisville, New Orleans & Texas Ry. Co., and Yazoo & Mississippi Valley R. R Co. in 1892 said corporations were consolidated into Yazoo & Mississipppi Valley R. R. Co.; that the payment of the taxes had been made by the required affidavit; that the profits of said railroad company had never enabled it to declare 8 per cent. dividend; and that by the decision in the Lambert case, 70 Miss., 779, the entire question had become *res adjudicata*. R. 94. The Commission overruled these objections, after hearing the evidence, and, then this bill was filed by appellant averring a diversity of citizenship—making Yazoo & Mississippi Valley R. R. Co a party defendant—to prevent the rendition of judgment by the Commission upon the law and facts then fully determined and upon which judgment was *in fieri*. Thus, after full defense by the principal before the Commission, and

after adverse decision, a new trial is sought by injunction in the Federal court of these judicial proceedings in the State court, by an alleged stockholder and mortgagee. Such a proceeeding cannot be maintained in any court of equity regardless of its Federal functions.

Yazoo & Mississsippi Valley R. R. Co., vs. *Adams*, 73 Miss, 648.

Same case, second appeal, Miss. *Decisions, March* 1899.

Youngston vs. *Kentucky*, 64 Fed. Rep., 441.

The Rairoad Commission in making the assessment, had jurisdiction of the subject matter and of Yazoo & Mississsippi Valley R. R. Co., and was acting judicially.

Yazoo & Mississippi Valley R. R. Co. vs. Adams, 73 Miss. 648.

Same case supra.

Wherein it was held that the Code of 1892 and the Act of 1894, chap. 34, entitled "An Act to provide for the election of a State Revenue Agent, to prescribe his powers and duties, and to repeal Sections 4187, 4190, 4192, 4193 and 4195, in chapter 126 of the Annotated Code of Mississippi," Acts 1894, p. 29, in regard to the assessment of railroads for taxation were constitutional, and that the proceedings of the Railroad Commission thereunder were judicial; and that the finding of the Commission that the property was "liable to taxation"

was conclusive upon the question of immunity from taxation; and that the judgment of the Commission could not be enjoined except for fraud. Citing,

Adams Express Co., vs. *Ohio*, 165 U. S. 229.

Railway vs. *Backus*, 133 Ind., 541.

Louisville Water Co., vs. *Clark*, 94 Ky., 47.

Stanley vs. Supervisors, 122 U. S. 154.

Winona vs. *Minn.*, 159 U. S., 534.

Fallbrook vs. *Bradley*, 164 U. S. 167.

Throop Pub. Officers, Section 541.

2 Desety Tax, 625 and note 2.

Burroughs Tax, Sec. 102.

Palmer vs. *Mahon*, 135 U. S., 665.

Railway vs. *Backus*, 154 U. S., 427.

This construction of the scope of these judicial proceedings, under these statutes by the State Supreme Court, will be followed by this court.

Forsyth vs. *Hammond*, 166 U. S. 516-18-9-20.

Backus vs. *Fort Street Depot Co.*, 169, U. S., 559.

Covington vs. Kentucky, 173 U. S., 231.

Henderson Bridge Co., vs. *Henderson*, 173 U. S. 602.

With full opportunity for defense before the Commission, one month being allowed for filing objections, the appellant, claiming to be in privity with Yazoo & Mississsippi Val-

ley R. R. Co., abandoned the forum organized expressly to decide what property was "liabe to taxation," and by injunction seeks to make in the Federal court, the defenses which should have been made before the Commission. This cannot be done.

Albuquerque vs. *Perea,* 147 U. S. 582.

Walston vs. *Nevin,* 128 U. S., 582.

Forsyth vs. *Hammond,* 166 U. S., 519-20.

Blythe vs. Hinckley 173 U. S., 508.

Says this court in the last case, p. 508: "It is enough for the present purpose that the State courts had concurrent jurisdiction with the circuit courts of the United States, to pass on Federal questions thus intimated; for the Constitution, laws and treaties of the United States are as much a part of the laws of every other State as its own local laws and constitution, and if the State courts erred in judgment, it was mere error and not to be corrected through the medium of bills such as those under consideration."

10. If jurisdiction is conferred by Sec. 483, Code, 1892, to enjoin the collection of taxes not authorized by law upon the Federal court under Cummings vs. Bank, 101 U. S. 157, the circuit court of appeals upon appeal had jurisdiction of that question .

11. Where by a single suit to recover back the entire claim can be determined equity has no jurisdiction. Shelton vs

Platt, 139 U. S. 595, and whether such was the case pertained to general equity jurisprudence.

12. Whether Lambert's case was *res adjudicata* as averred was a question of general equity jurisprudence and involved no Federal question.

San Francisco vs. *Itsell* 133 U. S., 65.

13. It affirmatively appears that the 21st Section as an exemption, was plead before the Railroad Commission and that the Lambert case was there plead as *res adjudicata* of this assessment, and the Commission decided both questions adversely to Yazoo & Mississippi Valley R. R. Co., and this decision was *res adjudicata* of these questions.

Yazoo & Miss. Valley R. R. Co., vs. *Adams*, 73 Miss. 648.

Same case on second appeal; Miss., Dec., March 27, 1899, p. 155.

Pittsburg vs. *Backus*, 154 U. S. 421.

Palmer vs. *McMahon*, 133 U. S. 665.

Forsyth vs. *Hammond*, 166 U. S. 517.

Decree of said chancery court set up in affidavit.

EXEMPTION—REPEAL.

To give rise to a Federal question and to create jurisdiction under the Constitution of the United States a contract of immunity from taxation must exist. Was it in existence from

1886 to 1891, the period covered by this assessment?

The bill is predicated upon the existence from 1886 to 1891 of an immunity from taxation, as to the property formerly belonging to Natchez, Jackson & Columbus R. R. Co., under said 21st Section as a part of the charter of Natchez, Jackson & Columbus R. R. Co., and upon the hypothesis that the benefits of this section passed to Louisville, New Orleans & Texas Ry. Co., by the deed from Natchez, Jackson & Columbus R. R. Co. in 1890, under the Acts of 1890, p. 675, and that the immunity followed this property into the hands of Yazoo & Mississippi Valley R. R. Co., under the consolidation of Oct. 2, 1892. The basis of the claim, therefore, is through the charter of the Natchez, Jackson & Columbus R. R. Co.

What is the true meaning of said 21st Section?

It is admitted in the bill that the courts of Mississippi have uniformly characterized this 21st Section as an *exemption* from taxation.

Mills vs. *Cook*, 56 Miss., 40.

Railway vs. *Taylor*, 68 Miss., 361.

McCulloch vs. *Stone*, 64 Miss., 378.

N. J. & C. R. R. Co., vs. *Lambert*, 70 Miss., 779.

The bills in Miss. Mills vs. Cook, 56 Miss., 40, R. 102, and in Lamberts case, supra R. 779, R. 113 averred this 21st Section to be a contract of appropriation; and the Miss. Mills case claimed protection of the Federal Constitu-

tion against repeal. Demurrers were filed in each of those cases, and the court held in both the cases that it was an *exemption,* and *repealable.* The pretense of this bill that this contract of appropriation theory is *res nova* is silenced by these decisions. The court in Lambert's case held that it is an exemption, "a mere grace," because *"paying is the burden."*

This 21st Section is a *conditional exemption* from taxation: that is, the taxes are agreed not to be exacted if the Railway Company will pay the amount thereof on its own debts of construction, for money borrowed, etc., and this is to continue until the company is enabled to declare an 8 per cent, dividend. The payment of its own debts is manifestly no benefit to the state. A promise to pay one's own debts is *nudum pactum* So, the State receives no benefit or advantage from the payment of the company's construction debts, and yet, for doing that which the company was otherwise legally bound to do—pay its debts—the company is released from the payment of the taxes assessed against it, and a receipt in full is to be given therefor.

This is, manifestly, a release from the burden of taxation. The mandate of the Constitution is that the property of corporations shall be subject to taxation *the same* as that of individuals; and that taxation shall be equal and uniform throughout the State, and yet, individuals and other corporations not favored with 21st Sections must pay the taxes assessed against

them in money—this company, by an affidavit that it had paid its debts. Terminology cannot change the essential thing. By the "contract of appropriation" this company is not to pay to the State, county or municipality any money as taxes—the same effect is produced by calling it an exemption. In fact, the Act of 1884, p. 29, which the Lambert case holds is the source of title to this immunity, enacts it as an *exemption*, and the Act of 1890, p. 12, treats it as an exemption.

There was no settled policy of exemption as averred in the bill.

The Constitution of 1832 left the matter of exemption from taxation to legislative discretion; it did not even contain the equality and uniformity clause. In 1857, by the Code of 1857, Art. 5 p. 292, all charters were declared to be repealable unless expressly made irrepealable.

Shotwell vs. *Ry. Co.*, 69 Miss. 556.

Columbus vs. *Bank*, 73 Miss., 96.

Y. & M. V. R. R. Co., vs. *Adams*, 77 Miss.

S. C. Said No. 244.

In 1869 a new Constitution was ordained and this policy of leaving these matters to legislative discretion was revoked, and the prohibitions and restrictions upon legislative power contained in said Sections 5, 14, 13 and 20 were ordained.

Such was the status of general statuatory and constitutional law on this subject when the charter of Natchez, Jack-

son & Columbus R R. Co., was granted in 1870. Acts 1870, p. 221.

The original charter of Natchez, Jackson & Columbus R. R. Co., contained no exemption or immunity whatever from taxation. But Section 26 provided: "And the rights, power and authority granted in and by this Act of Incorporation shall be perpetual, except that the same may be altered or amended as necessity may require."

Thus by the *general law* then in force, as well as by the prohibitions of the Constitution of 1869, and by its own terms, this original charter was repealable.

Said 21st Section was first enacted in 1870, as an attempt to evade the Constitution of 1869. *Lamberts case*, p. 786. By a *special* Act of August 8, 1870, the charter of the Natchez, Jackson & Columbus R. R. was amended, and the benefits of said 21st Section were extended to that company.

By the Code of 1871, superseding the Code of 1857, it was declared: "The following property and no other, shall be exempt from taxation, to-wit:" specifying, but not including railroads. Section 1662.

There is no special mention made of railroads as subject or not to taxation the Revenue chapter 22, Code 1871; Sec. 1668 provides: "All incorporated banks or other companies liable to taxation on their capital stock shall be assessed," etc. While Sec. 1747 imposed a privilege tax upon express,

telegraph and insurance companies, railroads were not subjected to any privilege tax.

The necessary result of the provisions of the Code of 1871 in view of Art. XII, Sec's. 13 and 20 of the Constitution of 1869, would be a repeal of the said 21st Section, and the imposition of *ad valorem* taxes upon Natchez, Jackson & Columbus R. R. Co.

The bill avers that its construction was not commenced until several years after the grant of the charter, and that it is uncertain whether any work had been done before 1878—the time of the decision of Miss. Mills case. R. 10.

So, before any expenditure had been made in construction, the said 21st Section, if repealable, was repealed by the Code of 1871. The effect of the Code of 1871 upon the said 21st section in the charter of Natchez, Jackson & Columbus R. R. Co., has never been considered or decided in any case.

In 1875 chap. 42, Acts 1875, p. 66., an Act entitled "An Act to Regulate Railroad Taxation" was passed, whereby it was provided: "That every railroad company whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax, as follows: * * * and the said privilege tax shall be in full of all other taxes, State, county and municipal, due from such company, or for which said company or its property could, but for the passage of this Act, be made in any manner liable; * * *.

Provided, that lands owned by railroad companies, and not acquired and used in operating ralroads, shall be taxable as other property."

By this Act the *ad valorem* taxation of railroads under the Code of 1871, was changed to a commutation privilege tax, and this tax was required to be paid by every railroad company in the State. This was a *general statute* specifically taxing railroad companies.

Such system of commutation privilege taxation was declared to be constitutional as to banks in *Bank* vs. *Worrell*, 67 Miss., 47.

Thus, before construction was commenced the immunity from taxation of Natchez, Jackson & Columbus R. R. Co., had been repealed by this act of 1875; and it was expressly so decided by Lambert's case, so much relied on by the bill.

In 1878, Chapter 116, Acts 1878, p. 233, a *special act* was passed in regard to the exemption of Natchez, Jackson & Columbus R. R. Co., reciting among other things, that 30 miles of the railroad had then been built; and that said act of 1870 extending said 21st section to Natchez, Jackson & Columbus R. R. Co. was not approved until after the adjournment of the legislature, and that the act was not passed by an aye and nay vote, and that doubt as to its constitutional enactment existed, and thus reciting, it, again, extends said 21st section to said company as to past and future taxes. This *special* act was ap-

proved March 5, 1878.

By a *general* act, approved the *same day* as the last named special act, March 5, 1878, Chapter 11, Acts 1878, p. 87, said act of 1875, p. 66, was amended so as to provide; "That every railroad company whose line is in whole or in part in this State, shall pay to the State Treasurer * * * in each and every year, a privilege tax of $80 per mile, upon each of said roads and branches thereof, in this State, except that upon narrow guage roads the privilege tax shall be but $40 per mile, and the said privilege tax shall be in full of all State, municipal and county taxes; fifty *per cent.* of which said privilege tax shall be placed to the credit of the counties through which said railroad may pass, to be drawn by the county treasurers of the counties in proportion to the number of miles of said roads in said respective counties; *Provided*, That lands owned by railroad companies, and not used in operating the railroads, shall be taxable as other property; and that this act shall not apply to the West Feliciana Railroad."

By this general taxing act it is clear that all the railroad property in the State was selected for and subjected to taxation. The language is mandatory.

The bill in Miss. Mills vs. Cook, 56 Miss. 45, was filed January 4, 1878. On March 12, 1878, the Chancery Court sustained the demurrer and dismissed the bill, and thereby adjudged that the legislature had power to repeal an exemption,

even though in the form of a contract of appropriation. In April, 1878, the State Supreme Court affirmed this decree, and, interpreting Section 13, Constitution 1869, R. 8, (*Yazoo & Miss. Valley R. R. Co.* vs. *Adams,* said No. 244.) held that the legislature had the power to select the classes of property to subject to taxation, and that the Acts of 1872 and 1873, exempting factories—individual and corporate — as a *general* class, were not violative of said Section 13; but that all classes of property selected for taxation must be equally subjected to taxation and that the legislature had the power to repeal the said exemption claimed, and that the act of 1877 repealing it in part was constitutional.

So, concurrently with the re-enactment of said 21st section by *special* act in 1878, there was a tax imposed by *general* act on all railroad property, and a judicial interpretation of Section 13 made that all property, individual or corporate, selected for taxation must be taxed alike. Hence, under the rule of Mills vs. Cook this special act of 1878, re-enacting said 21st section was unconstiutional.

No claim is made in the bill to any source of title to the immunity except the said act of 1870.

In Lambert's case the court held that the exemption repealed by the said act of 1875, was re-enacted by this *special* act of 1878. The attention of the court in that case was not drawn to the said general act of 1878 amending said act of 1875,

and approved on the same day as the said special act, nor was the effect of this general act of 1878 drawn in question or decided in Lambert's case. If it had been, under the principles of that case and of Mills vs. Cook, and *Worrell* vs. *Bank*, 67 Miss, supra, it would have been declared unconstitutional. It was so held by the Chancery Court in the decree set up in the affidavit filed in this court. There was, therefore, no exemption from taxation under the act of 1878.

Code 1880, Chapter 10, Section 597, provided that "each railroad company owning and operating a railroad in this State shall * * in each year, file with the auditor * a complete schedule of all its property, real or personal," specifying length of road, switches, capital stock, bonded indebtedness, etc., etc. Section 599 provides that the governor, auditor and secretary of state "shall * * assess the value of each railroad for the purposes of taxation," etc. "Section 604. The taxes so assessed in behalf of the State shall be due as other taxes, and if the same be not paid to the auditor * * within the time allowed other taxpayers, he shall proceed to collect the same by distress." "Section 605. The collector of taxes for any county shall collect the amount due the county, as is now provided by law in the case of delinquents." "Section 606. The property of any railroad company lying or being in any city or * * town may be taxed for city or town purposes, upon a valuation thereof made upon the same basis as the property belonging

to individuals and no more, and this section shall apply alike to the foregoing and following modes of taxation herein provided for."

"HOW COMPANY RELIEVED FROM FOREGOING REQUIREMENTS."

"Section 607. Each and every railroad company which will accept this act, and annually pay to the auditor * * the taxes hereinafter provided for, and will signify their acceptance in writing shall be exempt (except from the last preceding section) from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all State and county taxes; * * *provided* that lands owned by railroad companies and not used in operating the railroads, shall be taxable as other property for all purposes."

"PRIVILEGE TAX ON EACH RAILROAD COMPANY."

"Section 608. Each railroad company whose line is in whole or in part in this State shall, if it accepts the provisions of this act, pay to the State Treasurer * * in each and every year a privilege tax as follows, to-wit:" Specifying the several roads, and the amount of privilege tax, and among those specified is "Natchez, Jackson & Columbus R. R. Company, thirty dollars per mile;" * * "Provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed although

the whole road may not be finished."

Section 468, Code 1880, of Chapter 10, on public revenue, of which Sections 597-608 are a part, provides: "The following property, and no other shall be exempt from taxation, to-wit," specifying—but these do not include railroads; and the only exemption granted railroads is to those under process of construction under Section 608, Code 1880.

The Code 1880 changes the act of 1878 supra, in that there the privilege tax was imposed primarily as a commutation tax; by the Code *ad valorem* taxes were primarily imposed; and to those companies that would accept, *in writing*, the provisions of Chapter 10, the right was given of paying a privilege tax in lieu of State and county taxes on the railroad proper, but all municipal taxes and taxes on outlying lands had to be paid *ad valorem*

Code 1880, Section 3, provides: * * "All acts and parts of acts, the subject of which are revised, consolidated and re-enacted by this revised code, or repugnant to any of the provisions contained therein, shall be, and the same are hereby repealed, subject, however, to any express regulation relating thereto, which may be contained in this Code," And Section 8: "No private act, or act of local application, not revised or brought into this Code, shall be affected by its provisions."

The subject of railroad taxation is "revised, consolidated and re-enacted" by the Code, and "each railroad" is required

to pay *ad valorem* taxes, except that if it will accept the provisions of the act, in writing—that is, thereby indicating their election to pay privilege instead of *ad valorem* taxes they may pay privilege taxes; and the Natchez, Jackson & Columbus R. R. Co. is *expressly named* as one of the companies that may pay the privilege instead of *ad valorem* taxes.

Therefore, as correctly held in Lambert's case (the author of the Code of 1880 delivering the opinion) and in Y. & M. V. R. R. Co., v. Adams No. 244, the Code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co.

The *general* act of 1884, Chapter 22, (p. 29) entitled, "an act to amend Sections 607 and 608 of Code of 1880, in relation to privilege tax on railroads, and for other purposes," provides: "that Section 607 of the Code of 1880 be so amended as to read as follows," copying the exact language of Section 607, and then adding these words: "Any exemption in their charters to the contrary notwithstanding as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the State and county treasuries; *provided, further,* that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the first day of February, 1886."

Section 2 reads exactly as Section 608 of Code of 1880, except that the privilege tax is increased in amount and the speci-

fication as to the N., J. & C. R. R. Co. is as follows: "The Natchez, Jackson & Columbus Railroad Company, forty dollars per mile after expiration of exemption as provided in its charter, and acts amendatory thereof." And adds to Section 608 these words: "All the railroads not named herein and not exempt from taxation by their charter, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished, nor where the same is now exempt from taxation by its charter."

This act of 1884 was construed by Lambert's case to have restored the exemption repealed by the Code of 1880. In said No. 244, it was said that it was "doubtful" whether it was so restored.

Following the rule that exemptions are to be clearly and expressly granted, and that every presumption is against the grant, and that they cannot be extended beyond the express language of the grant (*Y. & M. V. R. R. Co.* v. *Thomas*, 65 Miss. 553, S. C., 132, U. S. 174; *State* v. *Simmons*, 70 Miss. 485), this statute cannot be said to create an exemption.

Applying this amendment to the Code sections it amends, we find that it does not purport to amend Sections 597-606 of Code imposing *ad valorem* taxes, but is confined to the amount

of privilege tax the several roads are to pay. In that light the statute would read that Natchez, Jackson & Columbus R. R. Co. must pay *ad valorem* taxes on the value of its road, unless that company will signify its acceptance of the act in writing and "pay to the State Treasurer, * * * in each and every year, a privilege tax, as follows: * * * The Natchez, Jackson & Columbus R. R Co., "forty dollars per mile after expiration of exemption as provided for in its charter and acts amendatory thereof."

This would mean, strictly constructed, that after the time —namely, thirty years from 1870—named in its amended charter, the N., J. & C. R. R. Co. should pay a privilege tax of forty dollars in lieu of *ad valorem* taxes; but the *ad valorem* taxes of Sections 597-606 are for every year *in presenti*, and not thirty years *in futuro*.

As there is no provision in the act of 1884 for a privilege tax on N., J. & C. R. R. Co. in lieu of *ad valorem* taxes of current years, but only for such privilege tax after thirty years from 1870, and as the act of 1884 only amends Sections 607 and 608 of Code of 1880, it would follow that no provision was made by the act of 1884 for the *ad valorem* tax of the N., J. & C. R. R. Co. for current years being commuted by a privilege tax.

If the words "after expiration of exemption as provided in its charter and acts amendatory thereof" should be con-

strued as meaning that the legislature assumed that the exemption then existed, and on this assumption provided the payment of the forty dollars privilege after its expiration, when in fact no such exemption then existed, it could not be held that it was the legislative intent to re-enact the exemption merely because it predicted the taking effect of the imposition of a tax at a future time upon this false assumption of fact.

Endlich Interpretation of Statutes, Sections 372-3-4.

There is no repealing clause to this act. It provides for amending Sections 607 and 608 of the Code so as to read as there provided. The necessary result of not providing, by the act of 1884, for a present privilege tax as commutation for present *ad valorem* taxes imposed by Secs. 597-606 would be to leave the *ad valorem* taxes to stand and be exigible. The fact that provision is made for a privilege tax as commutation for *ad valorem* taxes imposed by Sections 597-606 *in futuro,* would be no modification of the statute imposing taxes *in presenti.*

When the Code of 1880 and the act of 1884 provided for *general* taxation of railroads under Constitution 1869, Art. xii, Section 13 (as interpreted in Mills v. Cook), all railroad property must be taxed, and the attempted restoration of *special exemption* to N., J. & C. R. R. Co. by the act of 1884 would have been unconstitutional.

But if the act of 1884, re-enacted the exemption by pro-

viding that the time of payment of the privilege tax should not commence until after the expiration of the time granted by the charter, the general tax act of 1886, p. 23, repealed the exemption. Section 3 provides: * * * "and hereafter all the railroads in this State shall pay the privilege taxes assessed against them under all the pains and penalties prescribed in Section 589 of the Code of 1880;" and by Section 6 it is provided: "The the act entitled 'An Act to Amend Sections 607 and 608 of the Code of 1880, in Relation to Privilege Taxes on Railroads, Approved March 3, 1884,' be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said act at sums 25 per centum greater respectively than the sums mentioned in said act; and hereafter said railriod companies shall pay privilege taxes respectively 25 per cent. greater per mile than as fixed in said act."

This act was an amendment to the act of 1884; the Natchez, Jackson & Columbus R. R. Co was mentioned in said act; a privilege tax is imposed *in presenti* of 25 per cent.more than the sums mentioned in said act; "and *hereafter said* railroad companies," i. e., those "mentioned and referred to" in said act of 1884, "shall pay privilege taxes," etc. Not thirty years hence, but "hereafter," i. e., after the passage of this act. There is not a squint at any exemption being further continued. Therefore, the Supreme Court of Mississippi cor-

rectly held in said No. 244 that this act of 1886 repealed any exemption created before that time.

In 1890 a general taxing act was passed, entitled, "An Act to Amend the Revenue Laws," Acts 1890, p. 6, which, after prescribing general privilege taxes, by Section 5, provides: "That Section 1, of the act of March 12, 1884, relating to railroad privilege taxes be amended by striking out the last provision thereof, and that the same be re-enacted as amended. That Section 2 of said act of March 12, 1884, be amended by striking out all after the word "towit," in line 9, and inserting the following:

The Alabama Great Southern, per mile.....$150 00

* * * * * * *

The Natchez, Jackson & Columbus, per mile..... 50 00

* * * * * * *

The Yazoo & Mississippi Valley, per mile..... 100 00

* * * * * * *

The Mobile & Northwestern, per mile..... 150 00

And all other roads constructed and to be constructed,

per mile,..... .... 100 00

Provided no railroad shall be subjected to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished

and used for profit after such time, the same so used shall be taxed," etc.

In Lambert's case it was held that this act recognized the exemption if then in existence; but it did not hold that it created anew the exemption.

By this act taxes were imposed on railroads; that class of property was selected for taxation, and, when this was done, under Sections 13 and 20, Article 12, Constitution 1869, it would be an unconstitutional exercise of authority to exempt any railroad therefrom. The body of this act imposes taxation on railroads, but the proviso by declaring that "no railroad shall be subjected to taxation while exempt by its charter" is an attempted legislative repeal of Section 13, Article 12, declaring that all property shall be subject to taxation, and of Section 20, that taxation shall be equal and uniform. Under the rule of *Mills* v. *Cook*, 56 Miss. 46; *Lambert's Case*, 70 Miss. 779; *Worrell* v. *Vicksburg Bank*, 67 Miss. 47, and of *Adams* v. *Miss. Bank*, 75 Miss 701, this proviso would be unconstitutional if it created anew an exemption.

The true construction of said Sections 13 and 20, Article 12, Constitution 1869, is that adopted by the court in said No. 244, following the decisions of this court in *Louisville* vs. *Palmes*, 109 U. S., 248; *St. Louis* vs. *Berry*, 113 U. S., 475; *Schurz* vs. *Cook*, 148 U .S., 408; *Keokuk* vs. *Missouri*, 152 U.S., 310-12, whereby it is declared that these provisions are

mandatory upon the legislature and deprive it of the power to exempt from taxation.

The rule is settled that this court will interpret for itself the contract, *Dennis* vs. *V., S. & P. R. R. Co.,* 116 U. S, 665, and in so doing it will find that under its own decisions, now concurred in by the State court, there never existed any legislative power to grant the exemption claimed. It follows, therefore, that when the Constitution of 1890, was framed there was no existent exemption from taxation in Natchez, Jackson & Columbus R. R. Co., or in Louisville, New Orleans & Texas Ry. Co. as the grantee of its property, franchises and immunities.

If there was any doubt under the Constitution of 1869, the Constitution of 1890 made it certain that all railroads should be taxed and that, then, legally existing exemptions were repealable by the legislature. Sections 112, 181, 182, Constitution 1890. In *Adams* vs. *Miss. State Bank,* 75 Miss., 701, this Constitution was construed, and it was held that whenever a class of property was selected, all of that class must be taxed alike. The decisions of this court, followed by the State Supreme Court, in *Yazoo & Miss. Valley R. R. Co.* vs. *Adams, State Revenue Agent,* No. 244, held that taxation of all corporate property was mandatory.

In Lambert's case this clause of Section 181, "Exemptions from taxation to which corporations are legally entitled at the

adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature," was disposed of by this language: "Section 181, of the Constitution, has no effect as to the exemption claimed. It left the matter as if the Constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law." P. 790.

Therefore, there was no exemption from taxation from 1886 to 1891 of Natchez, Jackson & Columbus Railroad, and it was so held by said Chancery Court.

But if said exemption should be declared to then exist said 21st section declares that it shall be *irrepealable*, and this is in clear violation of said Article xii, Sections 13 and 20 of the Constitution of 1869, and is so held by every decision, State and Federal, on the subject. *Mills* vs. *Cook, supra; Bank* vs. *Worrell, supra; Attalla* vs. *Kelly, supra; Adams* vs. *Miss. State Bank, supra; Adams* vs. *Yazoo & Miss. Valley R. R. Co.*, said No. 244; *Louisville* vs. *Palmes*, 109, U. S., *supra; St. Louis* vs. *Berry*, 113, U. S., *supra; Schurz* vs. *Cook*, 148, U. S., *supra; Keokuk* vs. *Mo.*, 152, U. S., supra; 38 *Iowa*, 635; 34 *Cal.* 432; 25 *Ark.*, 289; 19 *Fla.*, 231.

Therefore, there could arise no question under the Constitution of the United States, because the alleged contract of exemption was void *ab initio* under the State Constitution.

There must be a *consideration* to the State to constitute a contract within the meaning of the Federal Constitution. *Tucker* vs. *Ferguson*, 22 Wal. 527; *Grand Lodge* vs. *New Orleans*, 166 U. S., 143.

The consideration recited in said 21st section was benefits to be received through a railroad *to be constructed*, not the grant of a *bonus* to a *constructed* road. The bill avers that the railroad "was not begun until several years after its charter" was granted; and that complainant is not informed whether any work had been done prior to the decisionof Miss. Mills vs. Cook by the Supreme Court; but that it was January, 1879, a full year after this decision before the road was finished from Natchez to Martin, 43 miles; and not until 1881, that it was extended from Martin to Miles, 15 miles, and not until 1882, that it was extended to Jackson. R. 10. The Supreme Court held expressly in the Lambert case that the said act of 1875 repealed said 21st section, and that it was re-enacted by the said act of 1878, p. 233, and that it was repealed by the Code of 1880, but that the exemption from taxation as an exemption was re-enacted by the act of 1884, the Lambert case declaring that this exemption was a "mere grace."

It is, therefore, clear that the railroad was not constructed on the faith of the exemption, and that the grant now claimed to exist was made in 1884, *after* the road was finished, and,

hence, not a contract within the Federal Constitution and it cannot give rise to a Federal question.

NO RIGHT AS STOCKHOLDER.

The bill predicates its right to relief in one aspect upon the relation of appellant, Illinois Central Railroad Company, to Yazoo & Mississippi Valley Railroad Company in this, that Mississippi Valley Company is a stockholder in Yazoo & Mississippi Valley Railroad Company and Illinois Central Railroad Company is the holder of the majority of the stock of the Mississippi Valley Company, and, therefore, appellant seeks to assert the right of Mississippi Valley Company against Yazoo & Mississippi Valley Railroad Company. This could not give rise to a Federal question. Stockholders cannot sue on behalf of the corperation unless *special* and sufficient reasons are shown. *Dodge* vs. *Watsey*, 18 How. 331; *Taylor* vs. *Holmes*, 127, U. S., 489; *Porter* vs. *Sabin*, 149, U. S. 473; *Foster's Fed. Prac.* Section 12, and even then, the Mississippi Valley Company would be an indispensable party to the suit. *Swan Land Co.* vs. *Frank*, 148 U. S., 603

No compliance with the 94th Equity Rule is shown.

NO RIGHT AS MORTGAGEE—JUDGMENT OF COMMISSION—JURISDICTION TO RESTRAIN.

A court of equity, State or Federal, has no jurisdiction to restrain the State Railroad Commission from hearing any ob-

jections that might be filed to the said assessment; nor from approving the assessment in process of adjudication, at the in stance of the owner or mortgagee.

1. The State Railroad Commission is a Constitutional Board of Assessors.

Const, 1890. Section112; *Y. & M. V. R. R. Co.* vs.*Adams,* 73 Miss., 648; *S. C., second appeal, Miss. Decis.* March, 1899, p. 155; *State Railroad Cases,* 92, U. S., 801; *Huntington* vs. *Wootten,* 120, U. S., 97; *Q. O. & C. Ry. Co.,* vs. *People,* 156. Ill., 441.

2. It, as a State Board of Assessors, is a court of special, limited and *exclusive* jurisdiction. *Y. & M. V. R. R. Co.* vs. *Adams,* 73 Miss., *supra; S. C., March,* 1899, *supra.* Code 1892, Section 3875 *et seq.* Acts Miss., 1894, Chapter 34;*Ratenberry* vs. *Yallabusha* 68 Miss., 470.

3. Its judgment is conclusive upon the value and what property is properly assessable, and whether exempt. *Y. & M. V. R. R. Co.* vs. *Adams, Miss., Dec.* March, 1899, *supra; Youngston* vs. *Kentucky,* 64 Fed. 441; *Throop Pub. Officers,* Section 541; *Stanley* vs. *Sup,* 122, U. S., 550; *Palmer* vs. *McMahon,* 135, U. S., 665; *Walston* vs. *Nevin,* 128 U. S., 582; *Ry. Co.* vs. *Backus,* 154, U. S., 427. Jurisdiction to determine the existence or not of an exemption of railroad property is expressly conferred by Code 1892, Sections 3875-3877, *Y. & M. V. R. R. Co.* vs. *Adams,* Miss. Dec., March, 1899, *supra;* and

in this respect the Commission differs from Boards of Supervisors.

4. The Commission's judgment was *in fieri* at the time of filing this bill awaiting objections to be filed, and therefore, injunction would not lie. *Y. & M. V. R. R. Co.* vs. *Adams,* 73 Miss., 648. The mortgagor Yazoo & Miss. Valley R. R. Co., had appeared before the Commission and pleaded the exemption and that Lambert's case was *res adjudicata,* and these defenses had been decided adversely to it; and when the period for filing objections had *not* expired, the mortgagee seeks to attack the judgment in this collateral way. *Albuquerque* vs. *Perea,* 147 U. S., 90; *I. C. R. R. Co.,* vs. *Hodges,* 113, Ill., 323; *2Beach Inj.,* Sec. 1203, *Ry. Co.,* vs. *Backus,* 133 Ind., 513, S. C., 154, U. S., 427. The remedy at law was then clear and adequate;and in case of adverse decision at law *certiorari* to review the decision was the proper remedy. *Y. & M. V. R. R. Co.* vs. *Adams,* Miss. Dec., March, 1899, *supra;* Code 1892, Sections 89-90.

A Federal Court has no jurisdiction to enjoin proceedings in aState Court. *U. S. Revised Stat.* Section 720; *2 Desty Fed. Proc.* p. 1170.

The owner of the property assessed, Yazoo & Miss. Valley Railroad Company makes no complaint of the assessment so made, and without any averment of insolvency, the mortgagee seeks to make the complainant as its privy in estate.

10158

5. Under the statutes of Mississippi in force from 1886 to 1891, inclusive, taxes assessed were superior liens to a mortgage "whensoever created."

"Taxes assessed upon lands or personal property shall bind the same and be entitled to preference over all judgments, executions, encumbrances or liens whensoever created; and all taxes shall be a lien upon and bind the property assessed," * * * "and it shall not be necessary to the validiay of an assessment that it shall be assessed to its true owner; but the taxes shall be a charge on the land or personal property taxed, and the sale shall be a proceeding against the thing sold, and shall vest the title in the purchaser, without regard to who may own the land or other property when assessed or sold." Code 1880, Section 470. Code 1892, Section 3746.

There was during the period, 1886-1891, provision for assessing property that had escaped taxation as follows: "The collector shall assess and collect taxes on all land liable to taxation left unassessed by the assessor * * * and he shall also assess such other persons and property as he may find unassessed by the assessor." Code 1880, Section 509, Code 1892, Section 3800.

By Chapter 34, acts of 1894, it is provided that if the State Revenue Agent shall discover property or persons that have "escaped taxation by reason of not being assessed" he shall give notice to the assessor or collector to assess the same and

by Section 4, "If the property which the Revenue Agent discovers to have escaped taxation shall belong to any railroad or other corporation, which, under the law, is required to be assessed by the State Railroad Assessors, the Revenue Agent shall give the notice required herein to said State Railroad Assessors, and they shall give the required notice to the company or corporation. At their next meeting, after giving the proper notice, said property shall be assessed in the same manner required by law," &c.; and by Section 1, said State Revenue Agent is created a State officer; and by Section 2: "He shall have power and it shall be his duty to proceed by suit in the proper court against all * * persons, corporations, * * * for all past due and unpaid taxes of any kind whatever. * * * He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue."

Under these statutes this results:

1. That the assessment is against the property, "without "regard to whom the land may be set down as reputed owner, "or who may own the land when assessed or sold."

Virden vs. *Bowers,* 55 Miss. 24.

2. The tax is a lien superior to any encumbrance or lien "whensoever created." Desty Tax. 739 et seq. Code 1880, Section 470. Code 1892, Section 3746.

3. When appellant became mortgagee the statutes for as-

sessing back taxes existed, and, it took *with notice* of the right to assess, and that such assessment would be superior to any mortgage "whensoever created."

"The omission of the tax officers of the State in previous years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature, or the legal construction of the statute under which the exemption is claimed." *Vicksburg* vs. *Dennis,* 116, U. S., 670. In that case the escape from assessment for taxes had been because the exemption had been treated as valid.

4. The mortgagor is owner until after sale, except as against the mortgagee after condition broken. Code 1880, Section 1204, Code 1892, Section 2449. The mortgage is no defense to a suit by mortgagor to recover the property or for damages thereto. *Illinois Central R. R. Co.* vs. *Hawkins,* 65 Miss. 200.

5. Until sale the mortgagor was owner of the equity of redemption, and, hence, the assessment, in any event, would bind it. And this is vendible under execution.

Vicksburg vs. *McCutchen,* 52 Miss. 645.

6. The deposit of the N., J. & C. R. R. Co.'s bonds with a trustee as security for the obligations appellant had assumed by its bonds would constitute only an equitable mortgage, and in order to constitute a *bona fide* purchaser for value, without notice, the purchase must be of the legal and not of the equit-

able title.

Wailes vs. *Cooper,* 24 Miss. 208.

7. As between purchasers under a trust deed, and under a sale for taxes imposed subsequently to the execution of the trust deed, the latter has the better title. "The lien of the State is the superior one, although subsequent in time, a superiority invariably according to it in the absence of some legislative declaration to the contrary."

Stafford vs. *Fizer,* 82 Mo. 396.

This case was approved in Keokuk vs. Scotland, 152 U. S., 327, where it is declared, that if the mortgagee is not made a party to the suit to enforce the lien for taxes that he would be entitled to redeem from the purchaser under the tax lien sale.

8. Retrospective taxes may be assessed under laws subsequently enacted. *Desty Tax,* 646. *Cooley Tax,* p. 291. *Winona* vs. *Minn.,* 159, U. S., 528-9.

A provision for assessing property for four years prior taxes was held valid. *Sturgis* vs. *Carter,* 114 U. S., 511.

Where the escape had been by an alleged exemption the taxes may be retrospectively enforced.

Vicksburg vs. *Dennis,* 116 U. S., *supra.*

It is settled in Mississippi that a corporation may be assessed for taxes for former years by the proper authority.

State vs. *Simmons,* 70 Miss. 485.

Bank vs. *Adams,* 74 Id. 179.

10160

And under Chapter 34, acts 1894. Y. & M. V. R. R. Co. vs. Adams, 73 Miss. 648; S. C. second appeal Miss. Dec. March 1899,*supra, Bank* vs. *Adams,* 74 Miss, *supra.*

9. Before an injunction could be obtained the complainant would be required to do equity, and that would require a tender of the taxes assessed against the mortgagor by the assessment.

Mortgage Co. vs. *Jefferson,* 69 Miss. 770.

Meridian vs. *Ragsdale,* 67 Id. 86.

10. The State has a lien for taxes assessed and for those that are properly chargeable on the property. Back taxes may be assessed and collected though the land may have passed into the hands of a *bona fide* purchaser.

Blackwell Tax. Tit., 4th Ed. p. 184, 5, 6, and cases.

If as mortgagee appellant had to pay the taxes it would be subrogated to the lien of the State.

Ingersoll vs. *Jeffords,* 55 Miss. 37, 40.

11. The mortgagee is a necessary party to the suit by State Revenue Agent to enforce the assessment when made; and if not made a party, the right to redeem would not be cut off. *Keokuk* vs. *Scotland,* 152 U. S., 327. In such suit to enforce the assessment every defense available can be made.

A mortgagee is privy in estate with the mortgagor as to actions begun before the mortgage was executed and is bound by decrees in such cases; but not by suits begun *after* the exe-

cution of the mortgage to which he is not a party. *Keokuk* vs. *Missouri,* 152, U. S., 314.

The rule that a party is precluded from relitigating questions involved in the former decision does not extend to denying the right of a party in a suit for subsequent years taxes from showing that the act under which he claimed previous year's taxes in the former suit was *unconstitutional. Philadelphia,* vs. *Ridge Av. Ry. Co.,* 142 Pa. St. 484. *Boyd* vs. *Ala.,* 94 U. S., 645, and this as between the original parties.

The case of Vicksburg, Shreveport & Pac. R. R. Co. vs Dennis, 116 U. S., *supra,* forcibly illustrates in one aspect the case at bar. In Morgan vs. La., 93, U. S., 217, the question was litigated whether the exemption from taxation had passed to a purchaser, and the court treated the exemption as existent, and interpreting the terms of the sale, held that the immunity did not pass. There, as in Lambert's case, no question of the constitutionality of the exemption was decided.

Subsequently in the Dennis case, supra, the question of the validity of the exemption was raised, and their court held that the exemption did not exist.

So, with the Supreme Court of Mississippi in said case, No. 244. And both this court and that held that the "omission of the taxing officers to assess certain property cannot control the duty imposed by law upon their successors, or the power of the legislature to tax the property, or the legal construc-

tion of a statute under which its exemption is claimed."

12. The Kentucky tax cases illustrate clearly the soundness of appellee's position here. Where there exists a power of repeal of an exemption from taxation—Constitution. 1869, Art. xii, Sections 13 and 20—the subsequent revocation of the immunity constitutes no breach of the Federal Constitution. *City Sav. Bank* vs. *Owensboro,* 173, U. S., 644; and the decision of the State Court upon the construction of its taxing statutes in their relation to the State Constitution will be followed by this court, even though this court may doubt its soundness. *Id.* No county or city is bound by the judgment of a State court as *res adjudicata,* even though the question may be identical, unless a party to the judgment. *Stone* vs. *Farmers Bank,* 174, U. S., 412. Whether a county or city is bound by a decision of the *identical question,* under the same circumstances and conditions, was left undecided by a divided court. *Id.* In *Stone* vs. *Farmers Bank, supra,* the bill was filed not to restrain the assessors from approving the assessment, as here, but from certifying the assessment, as approved, to the officers for collection; the former being a judicial, the latter a clerical function.

The court, in 88 Fed. 987, was careful not to enjoin any proceedings whatever in the State court. The court below there held that the decision of the State court holding the exemption irrevocable was *res adjudicata* of that *identical* ques-

tion under the same conditions and circumstances, and that the court was bound by the decision of the State court, thereby following *New Orleans* vs. *Citizens Bank*, 167, U. S., 371, and that having been established as an irrevocable contract by this judgment of the State court it was protected by the Federal Constitution. This decision of the court was affirmed by a divided court. Thereby this court overturned New Orleans vs. Citizens Bank as authority. As clearly shown by the opinion in said No. 244, the last decision of the State court, the Lambert case was not *res adjudicata* of the constitutionality of Section 21, nor of its repeal by the act of 1886; and that it might be *res adjudicata* as to Adams County for the taxes of 1891 and 1892 on N., J. & C. R. R., but it did not decide that it was. If the decision of the State court is followed the last decision nullifies any effect of the Lambert case as *res adjudicata*, and, hence, the contract is not established by *res adjudicata*. There is no *identity* of the question involved under the same circumstances and conditions. In Lambert's case the constitutionality of the 21st section was conceded, and the question was as in Morgan vs. La. *supra*, whether conceding its existence it passed to the purchaser. There was no question of the repealing effect of the act of 1886, *supra*, nor of the act of 1878, *supra*, made or decided, Therefore, the rule of *Keckuk* vs. *Mo.* 152, U. S., 301, was applied in said No. 244. In said No. 244, the Lambert case was not pleaded nor intro-

10162

duced in evidence as *res adjudicata,* and, therefore, if it had been *res adjudicata* of the question of exemption before No. 244 was decided it was not *res adjudicata* after that decision; the last decision is *res adjudicata. Oakes* vs. *Mose,* 165 U. S., 363; *Stout* vs. *Lye,* 103 U. S., 66; *Mills* vs. *Green,* 159 U. S., 654-8; 1 *Van Fleet Res. Adj.* 88

The Railroad Commission in the case at bar decided that the Lambert case was not *res adjudicata* of the assessment, and the Chancery Court in said decree recited in the affidavit herein adjudged that said judgment of said commission in making the assessment, and the decision of the State court in said No. 244 were *res adjudicata* of the liability of the property to taxation and that the taxes had not been paid. A decision that a matter is or is not *res adjudicata* does not give rise to a Federal question. *San Francisco* vs. *Itsell,* 133, U. S., 65. *Henderson Bridge Co.* vs. *Henderson,* 173 U. S., 608.

DECISIONS OF MISSISSIPPI COURT.

The decisions of the Supreme Court of Mississippi averred do not constitute, as to appellant, a rule of property; nor a vested right; nor a contract; nor *res adjudicata,* so as to raise a Federal question, because:

1. The Mississippi Valley Co. purchased the stock in L., N. O. & T. Ry. Co., in *April, 1892,* R. 17, and appellant purchased L., N. O. & T. Ry. bonds, and took the N., J. & C. R. R. Co.'s mortgage bonds as security and on September 1, 1892

executed its mortgage bonds to pay for said stock and bonds. R. 19.

1. The only case involving the exemption of Natchez, Jackson & Columbus R. R. Co.—and it was not presented there for decision—before the decision in Adams vs. R. R. Co., said No. 244, in 1898, was in N., J. & C. R. R. Co. vs. Lambert, 70 Miss. 779.

In Lambert's case the bill was filed January 9th, 1893, R. 107, the chancellor denied the relief, and, on appeal, at March term, 1893, the Supreme Court reversed the decree in May 1893. R. 90.

So, when, in 1890, L., N. O & T Ry. Co. acquired the N., J. & C. R. R. Co property and franchises, and when Mississippi Valley Co. purchased the stock of L., N. O. & T. Ry. Co., and when appellant purchased the bonds of L., N. O. & T. Ry. Co. and received N., J. & C. R. R. Co. bonds as security, and thereby, as averred, became mortgagee, there had been no decision upon the charter exemption of N., J. & C. R. R. Co., hence appellant, or those through whom it claims, could not have acted on such decision.

2. Miss. Mills vs. Cook, 56 Miss. 40, is relied on. The record shows that this was a bill for injunction by Miss. Mills, a manufacturing corporation, against Cook, tax collector, averring establishment of its factory after, and on the faith of general acts of 1872 and of 1873, (Par. 14 of bill) granting

10163

a general exemption from taxation to *all factories* in the form of a contract of appropriation but not irrepealable. R. 102; that these acts were amended by the act of 1877, repealing, in part, the exemption; that Cook would accept the affidavit in payment of the taxes on the mill proper, but refused to accept it, under the act of 1877, for taxes on the lands claimed by him not to be a part of the mill proper, but outlaying lands; and averring that these lands were essentially a part of the mill proper, for wood, etc. There was a general demurrer sustained, and the Miss. Mills appealed.

Thus the question there involved arose under a *general exemption law, applicable to all of the factories of the class described,* and not, as here, to a *special grant* of a *special exemption* to a *particular corporation,* and in express terms made irrepealable.

The opinion in that case goes beyond the question involved but it is the *record* and not the opinion that determines what is *res adjudicata.* 1. *Her Res. Adj.* p. 470. All factories—whether owned by corporations or individuals were taxed or exempted alike under this *general statute,* repealable at will, and the question of a special exemption to a special corporation, *irrepealable* by the legislature, was not involved in nor *decided* by that case. In fact, the proposition here was *conceded* by the Attorney General, in that case. The brief reported (56 Miss. p. 50.) states; "upon the whole my conclu-

sion is, that there can be no irrevocable exemption of property, whether of individuals or of corporations for pecuniary profits; that the property of both must forever remain subject to taxation whenever the legislature chooses to impose it; that the taxation of both must be by an equal and uniform rate, and that all taxation must be laid according to value."

No rule of property can be established by a decision in which the question upon which the rule is claimed to arise was a *conceded question* on the trial. *Keokuk* vs. *Missouri*, 152 U.S., 316.

The opinion of the majority of the court in the Miss. Mills case held, that the property of corporations must always be subject, i. e., liable to be taxed, and that whenever a class of property is selected for taxation all of that class must be taxed, and yet this Section 21 declares expressly that the exemption shall be *"irrepealable."*

If, as averred, this Section 21 is not an exemption, but a contract of appropriation, now for the first time asserted, then, the question would be *res nova*, and the decisions complained of have never been relied on as the true measure of appellant's rights.

A special exemption to a particular corporation, whereby its taxes duly assessed are to be paid by an affidavit that it had paid its own debts of construction to that amount, while the individual has to pay his taxes on the same class of property in

money, would violate the rule of Mills vs. Cook, *supra.* Essentially, this is not paying any taxes, and the payment is no payment at all; for a promise to pay one's own debts could be but *nudum pactum.*

The construction of Sections 13 and 20, Art. xii, together could not arise there as it does here. There all factories were taxed or exempted alike, and therefore, equal and uniform taxes were imposed by those statutes. But here railroad property as a class is selected for taxation; and the question is can a statute which exempts one railroad corporation property from its share of the taxes be upheld as making corporate property subject to taxation the same as that of individuals, and as equal and uniform taxation? Mills vs. Cook involved the abstract question of the power to exercise or withhold the taxing power on all of the class alike; this case involves the question of the exercise of the power to exempt a favored one from the class by irrepealable contract.

3. Vicksburg Bank vs. Worrell, 69 Miss. 47, (relied on by the bill)decided in 1889, illustrates that Mills vs. Cook, *supra,* was decided upon the general application of the Act of 1872 to all the class taxed; for, while affirming that the legislature may or may not tax under the Constitution of 1869, it declares: "The subjects of taxation may be classified at the discretion of the legislature, and if all of the same class are taxed alike there is no violation of the equality and uniformity re-

quired by the constitution." P. 57. This case involved a general privilege tax applicable to all banks. The real question was whether the act making a privilege or commutation tax stand in lieu of all *ad valorem* taxes was constitutional. No relationship can be traced between the two cases.

4. Attala County vs. Kelley, 68 Miss. 40, decided in 1890, (relied on by the bill) expressly declares that there is no vested right in methods of taxation. There Kelly, a banker, paid the commutation or privilege tax for the fiscal year, as required in advance; after payment, the privilege tax was repealed and *ad valorem* taxes imposed, and it was held to be within legislative power. The act repealed was the same as was involved in *Vicksburg Bank* vs. *Worrell, supra.* Clearly not a cognate decision to the case at bar.

5. McCulloch vs. Stone, 64 Miss. 378, (also relied on) was decided in 1886. The question decided was whether outlying lands, not used in the business of the railroad, were embraced within the meaning of Section 21.

It was purely a question of the meaning of the calls of the grant. No question of the validity or invalidity of Section 21, as an exemption was decided. The decision was that the outlying lands were not within Sec. 21, and therefore, properly taxable, and, hence, no question of their exemption under Section 21 could arise.

6. L., N. O. & T. Ry. Co., vs. Taylor, 68 Miss. 361, re-

lied on, was decided in 1891, and there it was *conceded on both sides* that McCulloch vs. Stone, supra, had decided that Section 21 was an exemption, and that the sole question was whether the gravel pit was outlying land within that decision. Under this concession the court in a short paragraph said: 'We think the appellant entitled to the exemption contained in the 21st Section of the charter M. & N. W. R. R. Co., Acts of 1870, P. 255, which exemption was conferred upon the consolidated railways by Chapter 555. Acts 1882." This case, as appears by the opinion in Adams vs. Y. & M. V. R. R., said No. 244, was decided upon *an agreement* which incorrectly stated the facts as to this Section 21, being embraced in the charters of one of the consolidating companies, and hence it was decided upon an erroneous concession of law and fact. Whether Section 21 was constitutional or not was not raised or decided. It would be intolerable to create rules of property, vested rights and unimpairable contracts by agreements as to facts or concessions at to the law. Says the court in Keokuk vs. Missouri, 152. U. S., 316. "This, if anything, was the rule of property, declared in this case; and as this rule of property is not relied on in this case, and the tax is defended *upon a ground not put in issue there,* but *conceded by counsel in favor of the company,* it is difficult to see how that case can be regarded as establishing any rule of property," etc.

Neither the N., J. & C. R. R. Co., nor the State were

parties to the Taylor case, nor were their rights there involved. The parties here would not have been bound by that decision if it had been the other way. Estoppels must be mutual to constitute *res adjudicata.* L., N. O. & T. R. R. Co., acquired the N., J. & C. Railroad in 1890, the year before this decision was made and, hence, it did not act in the purchase on the faith of it. The bonds of the N., J. & C. R. R. Co., were issued before this decision, and the appellant acquired its interest in these bonds after the decision.

A mortgage is privy in estate with the mortgagor as to actions begun before the mortgage was executed and is bound by decrees in such cases; but not by suits begun after the execution of the mortgage to which he is not a party. *Keokuk* vs. *Missouri,* supra, 314.

7. State vs. Simmons, 70 Miss. 485, decided in 1893, is relied on by the bill. While it is true that the court held that the property of Miss. Mills covered by the Act of 1882, P. 84, would be exempt, it was *conceded* by counsel on both sides that the Acts of 1872, 1873 and 1882 were valid to exempt all property within their scope; hence, this case is also within Keokuk vs. Missouri, 152, U. S. *supra.* The exemption was by general law not by its terms *irrepealable,* and not to a special corporation nor of a special kind.

8. Natchez, Jackson & Columbus Railroad Co., *et al.,* vs. Lambert, 70 Miss. 779, is particularly relied on by the bill. This

10166

case was decided against the Railroad Co., by the Chancery court on demurrer, and on appeal in May, 1893, it was reversed and remanded, and this decree of *reversal on demurrer* is relied on. The bill was filed by N., J. & C. R. R. Co., and Y. & M. V. R. R. Co. against J. W. Lambert, Tax Collector of Adams county, seeking to enjoin the *ad valorem* taxes of 1891 and 1892, assessed in the county of Adams against the N., J. & C. R. R. Co., division of the L., N. O. & T. Ry. Co., R. 108, upon the averment that N., J. & C. R. R. Co., was chartered in 1870, and afterwards, by Act of 1870, had said 21st section extended to it; that in 1878, by Act of the legislature, the exemption from taxation was re-enacted; that said 21st section was a contract of appropriation and not an exemption. R. 113; that under the Act of 1890 a sale was made of all the "property, rights, franchises and immunities" of N., J. & C. R. R. Co., to L., N. O. & T. Ry. Co., that on October 25, 1892, "the L., N. O. & T. Ry. Co., was merged into, and consolidated with the Y. & M. V. R. R. Co., and that by said merger and consolidation the capital stock, franchises, etc., of L., N. O. & T. Ry. Co., was merged into and became the property of Y. & M. V. R. R. C.; that the franchise to be a corporation did not pass by said sale to L., N. O. & T. Ry. Co.; but that since said sale N., J. & C. R. R. Co., has preserved its organization, had meetings of stockholders and directors, and was a "going" corporation; that the amount of the taxes of 1891 and 1892 had been applied

upon its debts of construction by N., J. & C. Ry. Co.; and that the tax collector refused to accept the affidavit of either N., J. & C. R. R. Co., or L., N. O. & T. Ry. Co., (Y. & M. V. R. R. Co.,) in payment of the taxes; and prays injunction. The bill was demurred to, but not on constitutional grounds, the demurrer was sustained in the Chancery Court, and the complainants appealed. There was also a plea filed setting up that L., N. O. & T. Ry. Co., on February 29, 1892, before consolidation with Y. & M. V. R. R. Co., had exhibited its bill against said Lambert to restrain the collection of the identical tax for 1891, to which bill a demurrer had been sustained, and that it was then on appeal, and that this pending suit was a bar.

The record in support of said plea shows a bill by L., N. O. & T. Ry. Co. vs. Lambert, substantially like that in N., J. & C. R. R. Co. vs. Lambert, except that L., N. O. & T. Ry. Co., made the affidavit provided for by Section 21, and Lambert refused to execute receipt; (the affidavit showed that L., N. O. & T. Ry. Co., had, "during the year 1891, actually and in good faith, paid and applied to the payment of debts and liabilities which they may have incurred in the construction of said road, for money borrowed by said company upon said lands or otherwise to be used in constructing said road, a sum equal." etc. This bill was demurred to, the demurrer sustained and bill dismissed by chancellor, and this appeal was pending when the bill was filed by N., J. & C. R. R. Co., and Y. & M. V. R. R.

Co. vs. Lambert, *supra;* and both appeals were decided by the case of N., J. & C. R. R. Co. vs. Lambert, 70 Miss. 779. It was held that the plea of former adjudication (pending suit) was bad because the suit was "fatally defective." The complainant (N., J. & C. R. R. Co.,) could not take any benefit from it. It was founded on an affidavit pleaded as a tender for the taxes of 1891, which had no reference to the Natchez, Jackson & Columbus Railroad, but to a different one," (L., N. O. & T. R. Ry. Co.,) and the decree in L., N. O. & T. Ry. Co. vs. Lambert was affirmed. The decree in N., J. & C. R. R. Co. vs. Lambert was reversed, the demurrer overruled, and leave given to answer.

Looking to the *records* in these cases we find it adjudged; 1st. That N., J. & C. R. R. Co., as a *going corporation* had the right to pay the taxes of 1891-2 on the property in Adams county it had conveyed to L., N. O. & T. Ry. Co., by an affidavit that it had applied the amount of the taxes due upon the property to *its* debts of construction. 2nd. That L., N. O. & T. Ry. Co., the purchaser, did not have the right to pay the taxes on the property conveyed to it by N., J. & C. R. R. Co., by an affidavit that it, L., N. O. & T. Ry. Co., had applied the amount of the taxes on said property to its debts of construction, etc. 3d. That N., J. & C. R. R. Co., was a "going" corporation in 1891 and 1892. 4th. That no exemption was claimed under any act except that under the acts 1870 and 1878. Note. There is no

averment of any exemption under the Act of 1884 or 1890, or Const. 1890 and therefore there could be *no adjudication* of any immunity recited in the opinion under these acts.

There is no reference in the opinion to the Act of 1878, approved the same day as the re-enacting Act of 1878, Acts 1878, pp. 87, 233, whereby the Act of 1875 p. 66 is amended and railroads as a class are selected for taxation, nor to the Act of 1886, *supra*, repealing the Act of 1884; nor is there any question of the constitutionality of said 21st Section litigated or decided. The case was decided on demurrer, and, therefore, only questions actually litigated and decided became *res adjudicata*. *Wiggins* vs. *O. & M. Ry. Co.* 142 U. S. 410.

In Adams vs. Y. & M. V. R. R. Co., said No. 244, the opinion of Mr. Justice Whitfield contains a clear and unanswerable exposition of these Mississippi cases, and shows that they are no barrier to the making and enforcement of this assessment.

THIS IS A SUIT AGAINST THE STATE.

Sec. 4194, Code 1892 provides that "all suits by the State Revenue Agent shall be in his own name for the use of the State, county, municipality, or levee board interested, and he shall not be liable for costs and may appeal without bond:" and the Act of 1894, p. 29, Section 2 provides: "He shall have a right of action and may sue at law or in equity in all cases where the State, or any county, municipality or levee board has the right of action or may sue." The injunction

10168

was against the State Railroad Assessors from approving the assessment for taxation upon which State, county and municipal taxes were to be based, and against the State Revenue Agent from bringing any suit to enforce said assessment. Essentially it was a restraint imposed upon the State itself and the suit was one against the State. *In re Ayers*, 123 U. S. 443; *Hans* vs. *La.* 134 U. S. 10; *In re Tyler*, 149 U. S. 165; *Tindall* vs. Wosley, 167 U. S. 219; *Fitts* vs. *McGehee* 172 U. S. 524-8; *Harkrader* vs. *Wadley* 172 U. S. 169. *Rev. Stat. U. S.* Sec. 720.

RES ADJUDICATA OF DECREE OF CHANCERY COURT.

The decree of the State Chancery Court, rendered at January Special Term 1900, for the identical taxes sought to be enjoined in this proceeding, in a suit by the State Revenue Agent against appellant and Yazoo & Mississippi Valley Railroad Company brought after the dismissal of the appeal by the Circuit Court of Appeals and before this appeal, adjudging expressly that said 21st Section of the charter of Natchez, Jackson & Columbus Railroad Company was void *ab initio* under the constitution of 1869; that said 21st Section in said charter was repealed by chapter 42, Act of 1875, p. 66 *supra*, that Chapter 11, Acts of 1878, page 87, *supra* operated as a repeal of said chapter 116, Acts of 1878, p. 233 purporting to re-enact said 21st section, and that said chapter 116, Acts of 1878, p. 233 was void being violative of the constitution of 1869, and especially so because of the enactment of said chapter 11; that, if then existent said exemption was

repealed by chapter 10, code 1880; that it is doubtful if chapter 22, Acts of 1884, p. 29, re-enacted said exemption, but if so, said chapter 22 was violative of said constitution in this regard: that if said chapter 22, re-enacted said exemption it was repealed by chapter 2, Acts of 1886, p. 23, and by chapter 2, Acts of 1890, p. 12: that if said chapter 2, Acts 1890, could be treated as recognizing said exemption as reenacted by said Act of 1884 such recognition was unconstitutional and void under said constitution of 1869: that said judgment of said Railroad Commission in making the assessment was *res adjudicata* and established conclusively the liability of said property to taxation and that said taxes had not been paid: that the decision of the State Court in said No. 244 was *res adjudicata* and established conclusively the liability of the property in controversy to taxation; and this decree is *res adjudicata* of the matters of this appeal.

1. An appeal from a decree dissolving an injunction does not affect the validity of the decree appealed from. *Slaughter House Cases*, 10 Wal. 273; *Hovey* vs. *McDonald*, 109 U. S. 150; *Planters' Bank* vs. *Calvit*, 3 S. and M. 143; *Kilpatrick* vs. *Dye*, 4, S. and M. 292.

2. Suit having been brought in the State Court after the discharge of the restraining order and decree having been rendered therein in the State Court for the taxes sought to be enjoined that decree is a bar to the further prosecution of this appeal. *Stout* vs *Lye*. 103 U. S. 68; *Case* vs *Beauregard*, 101 U. S. 688; *Mills* vs. *Green*, 159 U. S. 654-8 *Van Fleet Res. Adj.* p. 88, and cases.

10169

There are many other principles and citations pertaining to these Mississippi tax cases set forth in the briefs for appellees in said No. 318 and 320 of the docket of this court to which reference is made and which it is unnecessary to repeat here.

For these reasons this appeal should be dismissed: but if there should be found color for the appeal, the decree should be affirmed.

S. S. Calhoon
~~S. S. CALHOON~~,
Marcellus Green
~~MARCELLUS GREEN~~,

Of Counsel for Appellees, except Y. & M. V. R. R. Co.

No. 319. 78

Appx. to Br. for Appellees.

Office Supreme Court U.S.
FILED
APR 7 1900
[illegible]NNEY,
Clerk.

Filed April 7, 1900.

In the
SUPREME COURT OF THE UNITED STATES
NO. 319.

OCTOBER TERM, 1899.

THE ILLINOIS CENTRAL RAILROAD COMPANY,
Appellant.

vs.

WIRT ADAMS, STATE REVENUE AGENT AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.,
Appellees.

"Opinion of the Supreme Court of Mississippi, rendered on March 27, 1899 in case No. 9358, styled The Yazoo & Mississippi Valley R. R. Co. et al., vs. Wirt Adams, State Revenue Agent, use, etc., on pages 355-358

COPY BOUND CLOSE IN CENTER

STATE OF MISSISSIPPI,
Office of Clerk of the Supreme Court.

I, E. W. BROWN, Clerk of the Supreme Court of the State of Mississippi, do hereby certify that I have examined the opinion on pages 356, 357 and 358 herewithin, the same being part of the Southern Reporter, and that the same is a full true and correct copy of the opinion of the said Supreme Court of Mississippi in case No. 9358 (as corrected in said Reporter) therein styled Yazoo & Mississippi Valley Railroad Company et al., vs. Wirt Adams State Revenue Agent—use etc.,—as fully as the same appears of record and on file in my said office.

Given under my hand, and the seal of said Court at Jackson, Mississippi, in my said office on this 21 day of April A. D., 1900.

E. W. BROWN,
Clerk of the Supreme Court of Mississippi.

FOLD OUT IS TOO LARGE TO BE FILMED

THE SOUTHERN REPORTER.

COPYRIGHT, 1899, BY WEST PUBLISHING CO.

Vol. 25. WEDNESDAY, APRIL 26, 1899. No. 6.

ADVANCE SHEETS are not to be bound, and need not be returned to the publishers. They should be preserved for use as duplicates after the bound volumes are issued. The PERMANENT EDITION, printed on book paper, with wider margins, will be published in Bound Volumes only.

Subscribers are requested to carefully EXAMINE the reports of all cases in which they are interested, and report to us by mail, at their earliest convenience, any ERRORS, typographical or otherwise, occurring in these Advance Sheets, in order that the same may be CORRECTED for the PERMANENT EDITION printed for binding. This edition goes to press about one week after the last number of the volume is issued. Communications on this subject should be addressed, EDITORIAL DEPARTMENT, WEST PUBLISHING CO.

VOL. 9, CENTURY DIGEST,

Ready first part of May.

CONTENTS.

FRONT SHEETS:

CASES REPORTED—INDEX—REHEARING CASES—ADVERTISEMENTS.

SOUTHERN REPORTER, Vol. 25, No. 6, Pages 353-464.

CASES REPORTED IN THIS NUMBER.

LOUISIANA.

Brown v. Thompson (La.) 399
Shaw v. Harrison (La.) 378
Board of Aldermen of Opelousas v. Norman (La.) 401
Succession of (La.) 387
Bell v. Jones (La.) 368
Bowman v. Humble (La.) 431
Brown v. Kansas City, S. & G. R. Co. (La.) .. 457
Brown v. Kansas City, S. & G. R. Co. (La.) .. 463
Bruner v. Orleans Levee Board (La.) 415
Bussigne v. Abraham (La.) 441
Canal, L. & T. Trust Co. v. Smart (La.) 443
Carrollton Building & Loan Ass'n v. Johnston (La.) 383
Chase v. Drew (La.) 402
Chesapeake & R. R. V. R. Co. v. St. Louis S. W. R. Co. (La.) 424
Chinn v. Lewis (La.) 406
Clower v. Welch (La.) 405
Cole v. American Sugar-Refining Co. (La.) 447
Cole v. Carter (La.) 385
Cole v. City of New Orleans (La.) 421
Cole v. Dennie (La.) 394
Cole v. Devall (La.) 384
Cole v. Frierson (La.) 396
Cole v. Haines (La.) 372

LOUISIANA—Cont'd.

State v. Jackson (La.) 399
State v. Newman (La.) 408
State v. Picton (La.) 375
State v. Robinson (La.) 380
Town of Alexandria v. O'Shee (La.) 382
Trahan v. Simon (La.) 374
Willet v. Andrews (La.) 391
Williams v. Bernstein (La.) 411

MISSISSIPPI.

Barton v. New England Mortg. Sec. Co., two cases (Miss.) 362
Biloxi Canning Co. v. Stillwell-Bierce & Smith-Vaile Co. (Miss.) 366
Board of Levee Com'rs for Yazoo-Mississippi Delta v. Brooks (Miss.) 358
Fairbanks Co. v. Briley (Miss.) 354
Garner v. State (Miss.) 363
Hinson v. Forsdick (Miss.) 353
Jackson v. Alabama & V. R. Co. (Miss.) ... 353
McGuire v. Union Inv. Co. (Miss.) 367
Millsaps v. Shotwell (Miss.) 359
O'Gwinn v. Winner (Miss.) 354
State v. Quintini (Miss.) 365
Yazoo & M. V. R. Co. v. Adams (Miss.) 355
Yazoo & M. V. R. Co. v. Adams (Miss.) 366

STATUTES CONSTRUED.

UNITED STATES.

Const. Amend. art. 14. 355

LOUISIANA.

Const. 1879, art. 206. 447
Code Prac. arts. 765, 1160. 384
Rev. Civ. Code, art. 492. 408
Rev. Civ. Code, art. 825. 411
Rev. St. § 633. 384
Rev. St. § 681 et seq. 399
Laws 1882, No. 124. 387
Laws 1888, No. 36. 399

LOUISIANA—Cont'd.

Laws 1896, No. 113. 372

MISSISSIPPI.

Const. § 112. 355
Const. § 147. 358
Code 1892, § 2421. 365
Code 1892, § 3746. 355
Code 1892, §§ 3783, 3784. 367
Code 1892, §§ 3875-3886. 355
Laws 1882, p. 838, § 8. 366
Laws 1894, pp. 29-31. 355

(Index on page 3.)

Entered at the Post-Office at St. Paul, and admitted for transmission through the mails, at Second-Class Rates.